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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 349.

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ET AL., RESPONDENTS.

BRIEF OF PETITIONERS.

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SUPREME COURT OF THE UNITED STATES

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E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., PETITIONERS,

VS.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, A CORPORATION, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, ET AL., RESPONDENTS.

OPINION BELOW AND JURISDICTION.

Petitioners E. A. Kelleam, Nell Southard, Joe E. Kelleam and Joe R. Southard, Jr., prosecute this proceeding to review a decision of the United States Circuit Court of Appeals for the Tenth Circuit (reported at 112 F. (2d) 940), affirming a decree of the United States District Court for the Northern District of Oklahoma, which they assert was entered without jurisdiction or venue under the constitution and laws of the United States and contrary to applicable provisions of the local law and which involves the state and federal courts in a

direct conflict, the one deciding the identical controversy one way, and the other another.

The decree of the United States District Court was entered June 21, 1939; the final opinion of the United States Circuit Court of Appeals for the Tenth Circuit, upon appeal timely prosecuted, July 17, 1940, and on July 25, 1940, conformable to the rules, said circuit court by order stayed its mandate pending certiorari, petition for which was filed Aug. 20, 1940, and granted Oct. 14, 1940.

Jurisdiction of the Supreme Court of the United States is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 225, 43 Stat. 938, 28 U. S. C. A. 347) and under Para. 5 (b) of Rule 38.

STATEMENT OF THE CASE.

L. D. Kelleam died intestate, a resident of Creek County, Oklahoma, survived by the petitioners Dr. E. A. Kelleam and Nell Southard, his brother and sister, and by Fannie Bates and Mrs. Clyde Bates, paternal half-sisters (not parties to this proceeding), and by the respondents, other than the Maryland Casualty Company, who are children of five deceased paternal half-brothers and sisters. Upon joint petition of the brother and sister (R. 21-87) the brother was appointed administrator of the estate by the County Court of Creek County (R. 23-87). He qualified by executing a statutory administrator's bond with the respondent Maryland Casualty Company, a surety (R. 24-87), administered upon the estate, which consisted of real estate, cash, notes, stocks, personalty, etc. (R. 123), and presented his final account for approval. By an amended petition for determination of

heirship and distribution he alleged that the estate was a maternal ancestral estate and that he and his sister were sole heirs (R. 32-87); after notice by publication, as required by the statutes of the State of Oklahoma (R. 88), the County Court entered its decree adjudging the full brother and sister to be the heirs, ordering distribution of the estate to them, discharging the administrator and exonerating the bond (R. 35 to 41 and 87). No appeal was prosecuted from this decree by any adverse claimant and the decree became final under the applicable provisions of the Oklahoma statutes (58 O. S. A. 724).

The estate was distributed conformable to the decree to the full brother and sister, a report of such distribution made to the court, and an order of final discharge and releasing the administrator and bond from further liability duly entered on August 13, 1937 (R. 91).

By petition filed in the County Court on September 21, 1937, and amended petition filed November 16, 1937, the half-blood nephews and nieces who are respondents herein instituted in the County Court proceedings to vacate the decree of heirship and to recover an interest in the estate (R. 113 *ff.*, 92).

Therein they averred the entire proceedings theretofore had in the County Court were void for failure of notice and for fraud. Upon trial the County Court sustained a demurrer to the amended petition and ordered the proceedings to vacate the decree dismissed (R. 92). An appeal was prosecuted by the half-blood claimants to the District Court of Creek County (R. 93).

Some months after the proceedings to vacate the decree in the County Court were instituted, attorneys for the Maryland Casualty Company and attorneys for the

half-blood claimants conceived a plan to feign an issue in the federal court in an effort to circumvent the venue and jurisdiction of the County Court and appellate tribunals of the State of Oklahoma. Conformably, the surety filed the instant action in the U. S. District Court for the Northern District of Oklahoma, wherein it as plaintiff sued jointly the petitioners herein and the surety's co-respondents, asking that a receiver be appointed to take charge of the decedent's estate and that the property be impressed with an equitable lien to satisfy the claims of the half-blood kinsmen whom the surety averred were entitled to inherit and that its bond be exonerated (R. 5). E. A. Kelleam as administrator was never made a party defendant. The petitioners, J. R. Southard, Jr. and Joe E. Kelleam (sons of Nell Southard and E. A. Kelleam), were also designated as defendants for it was asserted that plaintiff believed the brother and sister had conveyed property to them, which conveyances plaintiff believed were without consideration and void. Fannie Bates and Mrs. Clyde Bates, the paternal half-sisters who had survived the decedent were designated as defendants in the complaint (R. 5) but not served with process nor did they otherwise become a party to the proceedings.*

Upon the date this suit was filed one of the half-blood contestants whose home was in Sallisaw (Sequoyah Co.), in the Eastern District of Oklahoma (28 U. S. C. A. 182) appeared in Tulsa, in the Northern District, and submitted to personal service there (R. 84).

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* The Mrs. F. Bates who filed answer and cross-petition is a half-blood niece, daughter of Mary Perkins, bearing the same name as her aunt (R. 10-11).

Ten days thereafter the half-blood nephews and nieces by attorneys filed their separate answer and cross-petition wherein they joined in the prayer of the surety company for a receiver, admitted that the surety company was entitled to the relief in equity sought in its bill and the appointment of a receiver to take charge of the decedent's property and impound it, and asked that court to decree void the proceedings of the County Court and determine them heirs to the extent of 5/9ths of all the estate of the deceased (R. 10-21). This was the identical relief which they had previously sought and for which they were prosecuting their claims in the County Court. Asserted ground of jurisdiction in the federal court was diversity of citizenship. The nominal plaintiff, Maryland Casualty Company, is a resident and citizen of Maryland; its co-respondents herein, who were named as defendants were alleged to be "residents and citizens of the State of Arkansas and the State of Oklahoma." It was averred that part of them *lived* within the Northern District of Oklahoma (R. 5). The bill asserted that at the time it was filed E. A. Kelleam was a *resident* of Sells, Arizona; that Nell Southard and J. R. Southard, Jr., were *residents* of the State of Oklahoma (the federal district of residence was not alleged), and that Joe Kelleam a *resident* of the State of Arizona. The bill contained no allegation regarding the citizenship of the defendants who are petitioners here.

Five days after the action was instituted in the national courts, the half-blood nephews and nieces filed their answer and cross-petition and wholly without any service or attempt at service upon or notice to the petitioners, the respondents obtained an order appointing one J. M. Scott receiver of all property, real and personal, which

constituted assets distributed by order of the County Court. The order recites that all designated defendants except the petitioners herein joined in the application for the receiver. Four days later the receiver filed oath and bond and entered upon the discharge of his duties and the attorneys for the surety company were appointed by the court as attorneys for the receiver (R. 84-5).

Proof of service of process upon petitioners who reside in Oklahoma was not filed with the clerk until over sixty days following the filing of the suit, and E. A. Kelleam was not notified of the proceedings until sixty days after the receiver was appointed. Failure to give them notice and delay in service of process upon them is wholly unexplained by the record (R. 84-85). There was no service by publication upon unknown heirs and no constructive service was ever had or obtained (R. 86).

Appropriate pleas to venue and jurisdiction over the parties and the subject matter were presented to the trial court by the petitioners, overruled and exceptions saved (R. 86). Answers and pleas to the jurisdiction on behalf of the petitioners filed January 25, 1939, denied that any of the defendants lived within the Northern District of Oklahoma, denied the controversy was between residents and citizens of separate and different states and expressly denied that as between plaintiff and the defendant, E. A. Kelleam, the controversy involved any property located within the Northern District of Oklahoma. The prior proceedings of the County Court of Creek County, including the judgments therein, were set forth in detail and were alleged to constitute valid and binding judgments in the controversy and to make the matters involved *res adjudicata*. Charges of fraud in the proceedings in the County Court were also denied (R. 50-55)).

The cause came on for trial at Tulsa June 21, 1939. The petitioners herein, appearing specially, objected to the introduction of evidence upon the ground of want of jurisdiction and venue and the failure of the plaintiff's petition to state facts sufficient to constitute a cause of action. This plea was overruled with exceptions allowed (R. 87). The evidence of the casualty company itself revealed fully the prior proceedings had in the County Court of Creek County, as hereinabove set forth. It further established that by warranty deed, Nell Southard and R. J. Southard, her husband, had conveyed to *Maud Grady* an undivided one-half interest in two city lots in Drumright, Oklahoma, and that E. A. Kelleam had conveyed to *Ophelia E. Kelleam* a like undivided one-half interest in the same lots, which had constituted part of the decedent's estate. The introduction of these deeds was made over objection on the ground that Ophelia E. Kelleam and Maud Grady were not parties to the suit (R. 90). Evidence was further offered to show that property inventoried as assets of Legette D. Kelleam was not inventoried as assets of his deceased mother, Mary A. Kelleam (R. 90), and to show (over objection) that the full brother and sister had paid the two half-sisters (Fannie Bates and Mrs. Clyde Bates), or their successors in interest, $4,000.00 in settlement of their claims, if any, to share in the estate (R. 93-94).

A claim agent of the casualty company testified extensively to unsuccessful efforts following the decree of distribution in the County Court to have Dr. E. A. Kelleam turn over the property received by the distribution to the casualty company. This was before it obtained the order of court appointing the receiver. The company's agent testified that under the indemnity

agreement, Dr. Kelleam agreed to hire an attorney in event there was a claim filed under the bond; that the agent had had some discussion regarding the matter with Mr. Finch (an attorney for the half-blood claimants), that in event a claim was filed under the bond and Dr. Kelleam didn't hire an attorney, the Maryland Casualty Company would hire one and charge it back to him. "Naturally I told him under this agreement, he was to put the property where it would be impressed with a lien of the Maryland Casualty Company * * *" (R. 97).

Streeter Speakman, the attorney who had represented Dr. E. A. Kelleam and Nell Southard in the County Court was called as a witness for the casualty company and testified to efforts of Mr. Green, attorney for the company, to obtain control of the property distributed to the petitioners here by the County Court. Upon examination by the trial judge, this witness testified that according to his investigation the deceased got the money which he invested from his mother; that he, after a thorough investigation, had concluded the estate was a maternal ancestral estate; that the matter was fully presented to the County Court which entered a decree so holding. In regard to the money paid to the two surviving half-sisters, he denied that there was any agreement of secrecy about the matter, but on the contrary testified that all claimants were made parties in the notice by publication which was the process provided by the statute and assured that they were specifically named in the proceeding (R. 105-7).

J. M. Scott, the receiver, established the jurisdictional value of some of the property (R. 107).

Mrs. Ethel Riddler, one of the respondents, testified that she lived in Ft. Smith, Arkansas, and identified

part of the persons claiming to be heirs from a list prepared by one of the attorneys. She said the family had separated a good many years ago; that some of the heirs lived in California, but that she couldn't give the post office address of any single one. She said it had been ten years before Legette died since she had seen Dr. E. A. Kelleam and that she had not heard from Mrs. Nell Southard in maybe ten or fifteen years; that so far as she knew none of the nephews or nieces visited Mrs. Southard and Dr. Kelleam before Legette died. Upon cross examination she further testified:

"* * * my sister heard that the estate had been administered and told me. That was two years ago last October" (R. 108).

The date so fixed (October, 1936), was prior to the heirship decree and in ample time to have allowed an appearance in the County Court.

Francis Kelleam, one of the respondents, testified that her home was in Sallisaw but that she was working in Oklahoma City. After establishing her own relationship, she stated she had a brother in Amarillo; a brother in California and a sister in Oklahoma City (R. 110).

Jim Kelleam, a respondent, testified that she was a sister of Francis Kelleam, that she had been in Oklahoma City for 21 months; that Dr. Fannin Kelleam, one of her brothers, was in Amarillo. There was no more satisfactory evidence of the citizenship of the defendants than that indicated. She further testified that she had never seen Mrs. Southard and would not know R. J. Southard, Jr.; that the last time she had ever seen E. A. Kelleam was in 1926 and that they did nor correspond with each other.

Deeds were introduced establishing that Lots 7 and 8, Block 2, Bell Vern Addition to Oklahoma City and Lots 29 and 30, Block 7, College Hill Addition to Oklahoma City, being part of the decedent's estate, had been transferred to the decedent from the Tulsa Bldg. & Loan Association (R. 112).

At the conclusion of the testimony offered by respondents herein, petitioners demurred to the evidence and moved to dismiss for that:

1. The court was without venue and jurisdiction over the parties or the subject matter.
2. The issues had theretofore been fully adjudicated in the County Court, and
3. No cause of action was established in favor of the surety company.

Their attorney informed the court that petitioners here would stand upon these issues (R. 112-3).

The trial court after inquiry as to why the proceeding on appeal had not been disposed of in the District Court of Creek County, took the matter under advisement and thereafter on September 26, 1939, entered findings of fact, conclusions of law, and the decree herein complained of (R. 67-82).

While treating the action as local under Sections 116 to 118, U. S. C. A., the court's decree attempted to readjudicate all matters theretofore determined by the County Court, held the judgment of that court that the property was ancestral void, that cross-petitioners were heirs and owners of a 5/9ths interest in the decedent's estate, directed E. A. Kelleam and Nell Southard to account to the cross-petitioners for 5/9ths of the estate, the

value of which was not determined, and decreed cross-petitioners to have a lien upon the property in the hands of the receiver to satisfy the judgment. No evidence of any conveyance to petitioners Joe E. Kelleam or Joe R. Southard, Jr., was offered at the trial. The sole evidence of any conveyance of property received from the estate by respondents E. A. Kelleam and Nell Southard were the deeds of two city lots in Drumright, Oklahoma, to Maud Grady and Ophelia E. Kelleam, who were not parties to the record. Nevertheless the trial judge without any evidence of the circumstances attending such conveyances, decreed the attempted transfer of any part of the decedent's property by E. A. Kelleam and Nell Southard fraudulently made for the purpose of concealing their ownership therein, and in an attempt to prevent said property being reached by the cross-petitioning defendants and held that the grantees in such conveyances as a matter of law took said property "with notice of the defects therein." This finding was made without even proof of any transfer of any part of the estate to respondents Joe E. Kelleam or Joe R. Southard, Jr.

The decree further determined the Maryland Casualty Company liable to the extent of $12,000, but did not specify to whom, and decreed it entitled to exoneration by having the property in the hands of the receiver applied to satisfy the claims of the cross-petitioners.

The court's findings of fact (R. 68) and decree (R. 81) fail to include a finding as to the citizenship, residence or address of Kelleam Hall, which was jurisdictional. The places of residence of many of the remaining defendants set forth in the findings of fact do

not correspond with any testimony in the case (R. 108-111) nor with the complaint (R. 5). The facts regarding diverse citizenship and jurisdiction were directly put in issue by the answer (R. 51-2).

Upon appeal duly prosecuted the Circuit Court of Appeals for the Tenth Circuit affirmed this decree and the action was brought to this court by certiorari in due form.

SPECIFICATIONS OF ERROR.

Jurisdictional errors in the proceedings complained of are as follows:

I. After final judgment had been entered by a County Court of the State of Oklahoma in the exercise of its probate jurisdiction to administer upon the estates of deceased persons, which judgment decreed heirship, ordered and approved distribution, discharged its administrator and exonerated his statutory administrator's bond, it was error to permit the non-resident surety upon such administrator's bond to enter suit in the United States District Court ostensibly for another "exoneration" upon the bond against the principal, who was also a non-resident, and upon non-resident service under Section 118, 28 U. S. C. A., to decree void the judgment of the County Court exonerating the bond, and to enter judgment imposing liability upon the surety and the administrator, for

a. The court had no jurisdiction of the parties to the bond.

b. The court had no jurisdiction of the asserted cause of action because of the prior judgment and proceedings of the state courts.

c. The court had no venue over the parties.

d. The action was not local under 28 U. S. C. A., Sections 116-118.

e. The bill stated no cause of action within either the legal or equitable jurisdiction of the court.

II. After a County Court of the State of Oklahoma in the exercise of its jurisdiction to review its own decrees has rendered judgment in a proceeding to vacate that court's final decree from which an appeal has been taken conformable to the state law to the District Court of the state, it was error to permit a non-resident surety upon the administrator's bond who was a party to the proceeding in the County Court to institute an original action in equity in the United States District Court and for that court to assume jurisdiction to supersede the County Court and the appellate tribunals of the state, and upon service as in a local action under the provisions of Sections 116-118, 28 U. S. C. A., to appoint a receiver of the decedent's estate and upon cross-petition of contending claimants reinvestigate on questions of law and fact the correctness of the County Court's decree of heirship and distribution and its order discharging the bond, determine heirs, direct an accounting by the persons adjudged lawful distributees by the County Court, surcharge the administrator upon his bond, impress a lien in favor of the losing claimants in the County Court upon the decedent's estate (part of which is realty located in the district), and order the same foreclosed, upon the theory that the action was a *local* action, where there was no diversity of citizenship between the contending claimants nor proof of the citizenship of part of them, and no party to the proceeding, either plaintiff or defendant was shown to be a resident of the district in which the suit was instituted and

questions of jurisdiction and venue were properly raised in the pleadings and preserved in the record, for in addition to the foregoing causes:

a. The burden was upon the persons asserting jurisdiction in the federal court for diversity of citizenship to establish diversity, which was not done.

b. There was no complete diversity of citizenship between the real parties in interest, hence no jurisdiction.

c. The relief prayed and granted was *in personam* against non-residents of the Northern District and was beyond the jurisdiction of the court.

1. The petitioners were neither inhabitants of nor found within the Northern District in which the suit was brought and who did not voluntarily appear and as to them the decree is void.

2. Because jurisdiction was predicated upon diversity of citizenship and neither plaintiff nor any defendant was a resident of the district, and objection was made by the petitioners.

SUMMARY OF THE ARGUMENT.

For reversal, petitioners here submit the following as controlling propositions of the law:

I. The jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction.

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding, both as to the subject matter and the parties.

III. The judgment of the County Court refusing to vacate its decree of heirship was in conformity to local law.

IV. Whether the judgment of the County Court was right or wrong, it was the duty of the federal court to sustain the plea of the petitioners to dismiss the bill of the surety for want of jurisdiction at the trial for:

a. The action, if any was *ex contractu* and transitory, and the court had no jurisdiction of the parties to the bond. Non-resident service upon the defendant E. A. Kelleam without the state was unauthorized.

b. The federal court had no jurisdiction of the asserted cause of action because of the prior judgment and decree of the state court. Were an action has been tried and judgment rendered in a state court of competent jurisdiction, and is pending on appeal in the state court, federal courts are without original jurisdiction to review the judgment. Appellate jurisdiction in cases of this character is vested exclusively in the Supreme Court of the United States after appeal to and decision by the highest court of the state to which an appeal may be had and even then under the limitations as to subject matter prescribed by federal law.

c. The U. S. District Court for the Northern District had no venue of the parties. They were not found within the district; did not reside within the district, and did not submit to service there.

d. The suit was not a local action under the provisions of 28 U. S. C. A., Secs. 116-118.

e. The bill stated no cause of action within either the legal or equitable jurisdiction of the court. The allegations of the bill and the evidence at the trial failed to show a cause of action maintainable under provisions of the local law.

V. It was the duty of the court to sustain the motion of the petitioners to dismiss both the bill and the

cross-petition at the trial for want of jurisdiction for:

a. The burden was upon those asserting jurisdiction in the federal court for the diversity of citizenship to establish diversity, which was not done. Neither the residence nor citizenship of Kelleam Hall was determined in the court's findings of fact or established by the evidence. The evidence is insufficient to show diversity of citizenship for vague and contradictory allegations with reference to residence and conflicting findings upon the facts as to residence are insufficient to establish citizenship for jurisdictional purposes.

b. There was no complete diversity of citizenship between the real parties in interest as required by 28 U. S. C. A., Secs. 111-112. The court should have realigned the parties in accordance with their true interests to test its jurisdiction and when this is done there is no complete diversity of citizenship.

c. The relief prayed and granted was *in personam* against non-residents of the Northern District and was beyond the jurisdiction of the court.

1. The petitioners were neither inhabitants of nor found within the Northern District in which the suit was brought and did not voluntarily appear. Since they were indispensable parties the decree is void.

2. Examination of the bill shows jurisdiction predicated not upon a local action or upon some provisions of the federal law but upon diversity of citizenship. Neither plaintiff nor any defendant was a resident of the district in which the suit was brought and timely objection was made by the petitioners. Under the circumstances, it was the court's duty to dismiss for want of jurisdiction under Title 28, U. S. C. A., Sec. 112.

ARGUMENT AND AUTHORITIES.

Any cause of action in favor of the Maryland Casualty Company must find its origin in the administrator's bond, filed in the County Court. The condition of the bond was:

> "* * * if the above bounden principal shall faithfully execute the duties of such trust as administrator according to law, then this obligation to be void, otherwise to remain in full force and effect."

Parties to this bond were E. A. Kelleam and the surety, and its liability was limited to the acts of the principal as administrator. This was a contractual liability purely, from which the final order of the County Court constituted a full and complete release.

The surety's suit presented for determination of the United States District Court purely an abstraction—whether it was entitled to what it calls "exoneration" after it had been discharged from liability. Under the pretext of presenting for adjudication this abstraction, contingent clearly upon acts beyond the control either of itself or of the court, such as the diligence and success of litigants in prosecuting an appeal and subsequent enforcement of appropriate remedies, by collusion with claimants whose interests were hostile to that of its principal, it obtained *ex parte* and without notice a receivership. It summarily divested heirs to whom property had been awarded in the usual course by the County Court, and their grantees who were not parties to the record, of property, real, personal, and mixed and wherever located.

Analysis of the opinion of the Circuit Court of Appeals indicates that jurisdiction in the United States District Court was sustained solely under Sectons 116 and 118, 28 U. S. C. A., which sections provide that a local action involving property of a fixed character lying partly in one district and partly in another may be brought in the District Court of either district and that service of summons on absent defendants may be had in suits to enforce liens. The court held Sections 111-112, 28 U. S. C. A., upon which appellants relied, inapplicable.

The nature of the suit in the opinion of the Circuit Court is variously stated:

A. *"This is an action to impress a trust on real and personal property with a fixed situs in the Northern and Western Districts of Oklahoma"* (R. 141). (Italics added.)

B. "The estate has been closed, the property * * * distributed * * *, and *this is a proceeding not against the administrator but against those who procured the property.* The proceeding is against them *in their individual capacities,* and is an attempt *to deprive them of what it is alleged they procured through a void judgment* * * *" (R. 142). (Italics added.)

C. "That a surety may maintain an action against its principal to obtain indemnity * * * is unquestioned. * * * In such an action a receiver may be appointed pending the determination of the issues in the action for exoneration. * * * But, say appellants, here the surety company has been twice exonerated. * * * *The whole controversy therefore centers around the question whether the judgment of the Probate Court was procured by fraud and is void"* (R. 142). (Italics added.)

The Circuit Court conceded and the trial court found no complete diversity of citizenship between the contending claimants (R. 68-9). Insofar as the action was one to impress a trust upon real and personal property, there was no complete diversity of citizenship between those seeking this relief. The surety joined by the half-blood claimants, some of whom were residents of Oklahoma, were opposed by the administrator and distributees under the order of the County Court, some of whom were also residents of Oklahoma. Insofar as the proceeding was not against the administrator but against those who procured the property to deprive them of what they procured through a void judgment, there was no complete diversity of citizenship because resident claimants were aligned on opposite sides. With respect to the action of the surety to maintain indemnity against its principal and the appointment of a receiver pending determination of the issues, the Circuit Court concedes that *the whole controversy centers around the validity of the judgment of the probate court.* This necessarily follows, for if the judgment is valid, the surety is not entitled to indemnity or to a receiver. Obviously, in any proceeding to void the judgment, all whose rights are affected by it must be made parties and when these are aligned in accordance with their true interests, the administrator and the surety and the distributees under the decrees of the County Court and their grantees must be arrayed against the half-blood claimants. When this is done, there is again no diversity of citizenship between the real parties in interest, and indispensable parties are absent or beyond the jurisdiction.

Or if the action be viewed as one between the surety and its principal upon the bond, clearly the suit is merely one on a contract, and maintainable only in the state and district in which defendant, E. A. Kelleam, resides.

The decree and judgments of the court below erroneously sustain jurisdiction in the federal courts to hold an administrator not sued as such liable for executing the orders of the court of which he was an officer. After the County Court's jurisdiction to review its own decree had been properly invoked and after judgment was rendered by it sustaining the questioned decree, which judgmnt under the state law was final, subject only to be vacated or set aside on appeal, the United States District Court was without jurisdiction to intervene by appointment of receiver and take charge of the entire litigation at the instance of a surety who was the beneficiary of the County Court's judgment. The jurisdiction of the County Court was exclusive original jurisdiction in probate matters. An appeal, which was an adequate remedy at law was available, and intervention of the federal district court by an original action in equity while the appeal was pending in the state court was unauthorized. Federal jurisdiction on appeal was not vested in the U. S. District Court but in Supreme Court of the United States after appeal to the highest appellate tribunal of the state and under the restrictions of the Constitution and Laws of the United States.

The opinion suggests the property had a fixed situs in the Northern District. But the decree was limited to no particular property but fixed a lien upon it all, real, personal and mixed, with no proof of its situs.

The opinion asserts that the County Court judgment was procured by fraud and was therefore void, but the acts charged as fraud (failure to give notice of the application for appointment as administrator and personal notice of the proposed distribution) are mere procedural acts like failure to issue some form of process. These

acts are not required by the statutes of the state, and such omissions have been held not fraudulent nor necessary both by the prior decree of the County Court and by decisions of the Supreme Court of the State of Oklahoma in like cases. The record shows the parties complaining not prejudiced by such omissions, for their testimony in the record indicates they did have actual notice.

To bolster charges of fraud it is asserted that a settlement was made with the surviving half-sisters and their successors in interest. But this in no manner prejudiced the rights of the cross-petitioners. Obviously a settlement which in no manner affected the rights of any party to this suit could not constitute fraud. Such a settlement was not even competent evidence on the issue of fraud.

To reinforce findings of fraud, the opinion refers to conveyances after the decree of heirship of the County Court as acts of a "faithless trustee." Such conveyances were not by the administrator at all, but by distributees whose ownership of the property had been at the date of trial twice upheld by the County Court and in strict conformity with their rights under the judgment. Why lawful acts performed in the usual course should be condemned with such severity is hard to understand.

Respondents' contentions applied invalidate the judgment of the federal court complained of.

If it be the law that no judgment can be valid without personal as well as constructive notice, and that any judgment entered without personal notice is so wholly void that it may be brushed aside by any court in any proceeding, consideration must be given to the effect of

the application of such rule in the case at bar. It is undisputed that the judgment appointing a receiver herein was entered by agreement between the respondents and without either actual or constructive notice to any of the petitioners. The decree attempts to determine the liability of Dr. E. A. Kelleam as administrator upon his official bond without ever serving process upon him or making him party in his capacity as administrator or his appearance as such. Under the terms of the bond the surety was only chargeable for his official acts.

The decree in the case at bar also attempts to vacate conveyances to *Maud Grady and Ophelia E. Kelleam*, who are not parties to the record, without notice to them of any kind. A new decree of heirship was attempted without notice to the surviving half-sisters or constructive service on unknown claimants. If the original judgment of the County Court is void for failure to give personal notice that herein complained of is void for failure to give any notice under similar circumstances.

The surety company attempted, it admits, to compel Dr. Kelleam, whom the County Court had twice determined lawfully entitled to that portion of the estate distributed to him, to turn over that estate to some of its representatives. To punish him for treating the orders of the County Court as binding it secretly obtained the appointment of a receiver by agreement with his adversaries. It delayed issuing process for an extended period, using the receivership, in a futile attempt to coerce him into an appearance in the federal court.

The decree complained of involves the state and federal courts in direct conflict. The administrator, E. A. Kelleam, was an officer of the court by which he was appointed, and distributed the property as directed by

that court. In a direct attack upon its decree, the County Court sustained its prior adjudication and again exonerated its officer. The U. S. District Court attempts to circumvent the orders of the County Court by summarily appointing a receiver to supersede and countermand execution of its orders, penalizing the administrator for discharging his duties conformable to the orders of the court by which he was appointed by surcharging him upon his bond and taking from him and another distributee an inheritance that had been awarded them as heirs.

Clearly the case represents a wide departure from the usual course of judicial procedure. If a surety upon a judicial bond twice exonerated by the court in which the bond was executed may by instituting suit for a third "exoneration" in the national courts thereby invest the federal district courts with authority to review cases pending on appeal in the state courts, vacate judgments, administer estates, decree heirship, and surcharge the bond, and enforce such decrees by receiverships, the functions of state tribunals where the interests of a nonresident surety are involved are at an end. For if the right to such an "exoneration" existed even after two judgments it obtained with even greater virility before either, and the surety, having contracted for hire to assume liability for the misconduct of the court's officer may supersede the court and the officer and take over the functions of both which cannot have been the intent of the law.

I. Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction.

> "The County Court shall have the general jurisdiction of a Probate Court. It shall * * * grant letters testamentary and of administration, settle accounts of * * * administrators, * * * transact all business appertaining to the estates of deceased persons, * * * and distribution thereof. * * *." Const. Okla., Art. VII, Sec. 13.

Incident to probate jurisdiction, such County Courts may upon final settlement and distribution determine the heirs to whom the estate shall go. *In re Thompson's Estate,* 179 Okl. 240, 65 P. (2d) 442. Certiorari denied, *St. John* v. *Thompson,* 58 S. Ct. 38, 320 U. S. 718, 82 L. ed. 554; *Wells* v. *Helms* (C.C.A. 10th Cir., Okl.), 105 F. (2d) 402.

> "The probate jurisdiction of the county courts extends to the sale, settlement, partition and distribution of the estates of deceased persons (Section 13, Art. 7, Constitution); and it has long been recognized that as an incident to that jurisdiction the county court may, upon final settlement and distribution, determine the heirs to whom the estate shall go, as provided in sections 1358-1361, O. S. 1931. That power extends at least to all assets subject to payment of the debts of the deceased. *Teague* v. *Smith,* 85 Okl. 12, 204 P. 439; *Hilton* v. *Coyne,* 103 Okl. 279, 229 P. 630; *Hogan* v. *Superior Court,* 122 Okl. 295, 254 P. 966; *Hutson* v. *McConnell,* 139 Okl. 240, 281 P. 760; *Hardridge* v. *Hardridge,* 168 Okl. 7, 31 P. (2d) 597." *In re Thompson's Estate, supra.*

> "An administrator appointed by a state court is an officer of that court and takes possession of the decedent's property in obedience to the orders of the court. His possession is the court's possession and

cannot be disturbed by any other court. *Byers* v. *McAuley,* 149 U. S. 608, 615, 13 S. Ct. 906, 37 L. ed. 867." *Wells* v. *Helms, supra.*

"Sec. 13, Art. 7, Okla. Constitution, Okl. St. Ann. (O. S. 1931, Sec. 1067, 58 Okl. St. Ann., Sec. 1) confers general probate jurisdiction upon the county courts of Oklahoma. Incidental to that general jurisdiction it has power to determine heirship pursuant to the provisions of Secs. 1358 to 1361, O. S. 1931, or Secs. 1386 to 1396, O. S. 1931, 58 Okl. St. Ann., Secs. 631-634, 84 Okl. St. Ann., Secs. 251-261. *In re Thompson's Estate,* 179 Okl. 240, 65 P. (2d) 442, 445." *Wells* v. *Helms, supra.*

Where administration proceedings are pending in the County Court, or may be instituted therein, District Courts have no jurisdiction or power to undertake to administer upon such an estate by a receivership.

"In the case of *Dillard* v. *Franklin,* 177 Okl. 34, 57 P. (2d) 629, an administration proceeding was pending wherein a will was being probated, and certain minor heirs were represented by a guardian, and the district court undertook to appoint receivers for the administration of the estate, it being alleged that mismanagement and misconduct were bringing about the destruction of the estate. We said: 'Under Section 13, Article 7, of the Constitution of Oklahoma, the county courts of this state have the general jurisdiction of a probate court. They shall probate wills, * * * grant letters testamentary and of administration, settle accounts of executors and guardians, and transact all business appertaining to estates, including the sale, settlement, partition, and distribution of the estates; and, while administration proceedings are still pending, the district courts of this state have no jurisdiction to appoint receivers to take charge of said estates."

"We will not cite additional authorities, for we think there can be no better settled rule of law." *Bryan* v. *Seiffert,* 185 Okl. 496, 94 P. (2d) 526.

Prohibition lies to prevent such an unauthorized act of a district court. *State ex rel. Morrell* v. *Worten,* 161 Okl. 130, 17 P. (2d) 424.

The jurisdiction of the District Court in probate matters is appellate only.

The original jurisdiction in such matters is exclusively in the County Court. The jurisdiction of the District Court in such matters is appellate only. Section 16, Art. 7, Constitution. *In re Gentry's Estate,* 158 Okl. 196, 13 P. (2d) 156; *In re Douglas' Estate,* 185 Okl. 25, 90 P. (2d) 35; *In re Barrett's Estate,* 181 Okl. 262, 72 P. (2d) 482.

The decree of the County Court determining heirship, rendered as incident to final settlement, unless appealed from, is conclusive. *In re Thompson's Estate,* 179 Okl. 240, 65 P. (2d) 442.

"Probate proceedings in the settlement of estates are in the nature of proceedings *in rem,* and, when statutory notice has been given, all the world is charged with notice. And a decree of distribution and settlement of heirship rendered on such notice, in the absence of a showing of fraud or collusion, is binding on all parties claiming an interest in the estate, even though not mentioned in the proceedings nor personally served with notice." *Wolfe* v. *Graham,* 90 P. (2d) 1067, 185 Okl. 318.

The appeal must be taken by a person interested, who was present, within ten days, and by a person interested, who was not a party, and not present, within thirty days.

"An appeal by a party, or by a person interested who was present at the hearing, must be taken within ten days, and an appeal by a person interested, who was not a party and not present at the hearing, within thirty days from the date of the judgment, decree or order appealed from." 58 O. S. A. 724.

"Defendant sought by her motion in county court to have entered *nunc pro tunc* an alleged order approving the loan which order, she says, was made at the time the loan was consummated. The ruling of the county court was to the effect that no such order of approval had ever been made, and refused to enter one as requested. Eighty days, or more, went by before an appeal was attempted from this order. If the order was one affecting a substantial right, Section 1397, O. S. 1931, 58 Okl. St. Ann., Sec. 721, it was appealable, and, if appealable, the notice was filed too late and the district court acquired no jurisdiction of the *nunc pro tunc* matter. The statute is mandatory, Sections 1400, 1041, O. S. 1931, 58 Okl. St. Ann., Secs. 724, 725; *Sutter* v. *Sockey,* 97 Okl. 107, 223 P. 161." *Hines* v. *Armstrong,* 77 P. (2d) 671, 182 Okl. 344.

District Courts have no jurisdiction until and unless an appeal is prosecuted in compliance with this section.

"Before the district court can hear and determine a cause appealed from the county court in a probate proceeding, its appellate jurisdiction must be invoked by a strict compliance with the requirements of the statute regulating such appeals." *Adair* v. *Montgomery,* 74 Okl. 21, 176 P. 911.

Provisions as to time must be observed.

"The time in which to take appeal from orders of the county in probate matters, to the district court, is fixed by Section 1413, Comp. Stat. 1921, and must

be complied with by taking the appeal within the time therein provided. If the appealing party is a party to the proceeding, or, if not a party to the proceeding and having an interest therein and present at the proceeding, the appeal must be taken within ten days. Others interested in the proceeding must appeal within 30 days." *Sutter* v. *Sockey*, 97 Okl. 107, 223 P. 161; *Hines* v. *Armstrong*, 182 Okl. 344, 77 P. (2d) 671, *supra*.

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding as to both the subject matter and the parties.

The surety, the administrator, and the contending heirs were all parties to the proceedings in the County Court.

> "Q. Mr. Green did appear in the County Court?" "A. That is right, he was representing the Maryland Casualty Company" (R. 97).

The statutes of the State of Oklahoma require no personal notice to persons claiming a right to inherit. Jurisdiction to distribute property, real and personal, depends upon notice by publication, which in effect is a summons to the world.

> "Mrs. McJunkin, his sole issue, was not mentioned in the will. She was left to inherit that portion of Mrs. Gassin's estate which her father would have taken had he been alive. * * * But she made no claim for it. Decree of distribution, upon proper notice, was passed confirming the land to plaintiffs under the will. By direction of statute this decree was 'conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal.' * * * However reprehensible it may have been for Mrs. McJunkin's aunts and uncles, who knew of her existence and could have

learned her whereabouts, to have refrained from seeing to it that her interest in the estate was preserved, there was no fraud which prevented an appearance in her behalf. The notice prescribed by statute being given, there was no further duty owed her by them. *Monk* v. *Morgan*, 49 Cal. App. 154, 192 P. 1042. The statute required no personal notice. It is constitutional. *Goodrich* v. *Ferris*, 214 U. S. 71, 29 S. Ct. 580, 53 L. Ed. 914. When the required notice is given, hearing had and decree entered, though erroneous, the latter is invulnerable to collateral attack, except as it may be vacated pursuant to statute or set aside for extraneous fraud. It concludes unknown heirs. * * * Jurisdiction to distribute the lands depended upon notice of hearing to that end, which was given. This notice, in effect, summoned the world." *Gassin* v. *McJunkin*, 48 P. (2d) 320, 173 Okl. 210.

The decree of distribution is binding on both the administrator and his sureties and is not subject to collateral attack. *Hartford Accident & Indemnity Co.* v. *Goldberg*, 61 P. (2d) 704, 178 Okl. 75.

"In *Boudinot, et al.* v. *Locust, et al.*, 55 Okl. 662, 151 P. 579, 155 P. 698, this court held: 'The sureties upon an administrator's bond are, in the absence of fraud, concluded by the decree of the county court, duly rendered upon a final settlement and accounting by their principal, as to the amount of the principal's liability, although the sureties on the bond are not parties to the accounting.'

"And said: 'The judgment, being final, is conclusive in this action, not only as to the administrator, as principal, but also as to the sureties on his bond. The current of authorities is almost unbroken that final settlements of the administration, when made by an executor or administrator in pursuance

of statutory requirements, are conclusive as to all matters therein directly adjudicated.'

"Therein this court quoted from Judge Woerner in his work on the American Law of Administration, Sec. 255, stating the general rule as follows: 'The liability of a surety on an administrator's bond is coextensive with the liability of the principal in the bond. The refusal or neglect of the principal to obey or comply with the judgment or decree of a court of competent jurisdiction constitutes a breach, rendering the sureties liable, and they are bound and concluded by such judgment against the principal, unless, of course, there was collusion or fraud between the principal and those who seek satisfaction out of the sureties, which must be established in a direct proceeding.'

"The defendants' answer was a collateral attack on a judgment of a county court. That judgment may not be attacked collaterally. *Johnson* v. *Petty*, 118 Okl. 178, 246 P. 848." *Exendine* v. *Iron*, 4 P. (2d) 1035, 153 Okl. 177.

County Court judgments are entitled to the same presumptions of validity that attend those of other courts.

"County courts in this state have general jurisdiction in probate matters and their orders and judgments will be accorded the same force, effect, and legal presumption as other courts of general jurisdiction.

"The fraud which will justify the cancellation in an equitable suit of a judgment or order of the probate court must be extraneous to the issues, and such as prevented the complaining party from having a fair hearing.

"False evidence or perjury alone, relative to an issue tried, is not sufficient grounds for vacating or

setting aside a judgment; the fraud which will authorize the court to vacate a judgment must be extrinsic or collateral to the issues tried in the cause wherein the judgment was rendered; it must be such fraud as to prevent the other from having a trial of the issues.'' *Calkin* v. *Wolcott, et al.*, 77 P. (2d) 96, 182 Okl. 278.

The County Court also had the jurisdiction to review its own decree for fraud or irregularities which it exercised.

> ''In the case of *Caulk* v. *Lowe*, 74 Okl. 191, 178 P. 101, 106, this court held:
>
> > 'It cannot be questioned that under Sections 5267 to 5275, Revised Laws, inclusive, the county court had jurisdiction to set aside its orders and judgment for fraud practiced by the successful party in obtaining such orders or judgment.' '' *Wheeler* v. *Bigheart*, 172 Okl. 262, 43 P. (2d) 1028.

The parties conceded this jurisdiction and first sued in the County Court.

III. The judgment of the County Court refusing to vacate the decree was in conformity to local law.

The full-blood brother was entitled to letters of administration upon application forthwith and without notice. 58 O. S. A. 122, so far as material reads:

> ''Administration of the estate of a person dying intestate must be granted to some one or more of the persons herinafter mentioned, and they are respectively entitled thereto in the following order:
>
> 1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.

2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate."

And 58 O. S. A. 123 provides:

> "Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole blood to those of the half blood."

Sims v. *Billings,* 162 Okl. 51, 18 P. (2d) 1084; *Appeal of Sims' Estate,* 162 Okl. 35, 18 P. (2d) 1077, holding that:

> "A party under the statute having the prior right of appointment of administrator is entitled to the appointment without notice to anyone."

That the administrator failed to give personal notice to adverse claimants or to allege in his pleadings that claimants he contended were not heirs were heirs in fact was not fraud. *Wright* v. *Saltmarsh,* 174 Okl. 226, 50 P. (2d) 694; *Gassin* v. *McJunkin,* 48 P. (2d) 320, 173 Okl. 210. The following is quoted from the former case:

> "Now, are the acts of fraud alleged of such character that would warrant the court in setting aside a judgment? It is a settled rule in this jurisdicion as well as most other states that fraud which vitiates judgment and which will authorize a court of equity to vacate it is fraud extraneous of the record by which the court was imposed upon in the proceeding, or by which the party complaining was prevented

from having his interest fairly presented or fully considered by the court. *City of Guthrie* v. *McKennon,* 19 Okl. 306, 91 P. 851; *Brown* v. *Trent,* 36 Okl. 239, 128 P. 895; *Ely Walker Dry Goods* v. *Smith,* 69 Okl. 261, 160 P. 898.

"Does the fact that the defendant failed to disclose to the county court certain knowledge which she possessed which, if disclosed, might have defeated her recovery come within the above rule? It was held in *Burke, et al* v. *Bladine, et al.,* 99 Wash. 383, 169 P. 811, 814, that: 'It is not fraud for a party to an action to fail to disclose to his adversary evidence that will defeat his own claim and sustain that of the adversary.'

"And in the case of *Davis* v. *Seavey,* 95 Wash. 57, 163 P. 35, 36, Ann. Cas. 1918D, 314, that 'The only allegation of the complaint which in any way suggests fraud on the part of respondent is that she as executrix came into possession of the property and papers of the deceased, including the alleged codicil, and that she did not make known to the court the existence of the codicil in the course of the administration of the estate. This in no event could amount to anything more than an allegation that respondent did not present to the court upon the final distribution hearing the true facts touching the question of who is entitled to the property as distributee. In other words, this is nothing more than an effort to avoid the decree of distribution as a final adjudication because of the presenting of false proof touching the merits of the question of who is entitled to the property of the estate as distributee.'

"Now the text-writers, in dealing with this subject in 34 C. J. 475, announce the rule as follows: 'No party is bound to furnish weapons to his adversary or plead himself out of court; and the mere fact that he keeps silent and does not communicate

to the court or to the adverse party the facts which would defeat his recovery is not such fraud as will justify a court in equity in enjoining a resulting judgment.' "

It would be a strange rule that branded fraudulent allegations of facts in pleadings honestly believed to be true and which were thereafter sustained by the court upon thorough investigation of the facts as the record shows to be the case here. Any error made was an error of the court in applying the law to the facts but not fraud.

Laches and limitations were of course available as defenses in the County Court. The evidence before that court is not in the record, but the law presumes evidence presented at the trial supported and judgment entered. *Manuel* v. *Kidd,* 258 P. 732, 126 Okla. 71. Moreover, it is established that at the trial in the federal court Ethel Riddler, one of the half-blood claimants, testified:

"My sister heard that the estate had been administered and told me. That was two years ago last October."

The date so fixed was prior to the decree of heirship and this evidence stands undisputed. It follows therefore that the judgment of the County Court sustaining its decree conforms strictly to the laws of the state.

The construction of administration laws of the state by the Supreme Court of the state is binding on the federal courts. Such laws are not merely rules of practice, but laws limiting the rights of the parties. *Security Trust Co.* v. *Black River Nat. Bank,* 187 U. S. 211, 23 Sup. Ct. Rep. 52, 47 L. ed. 147.

IV. It was the duty of the federal court to sustain the plea of the petitioners to dismiss the bill of the surety for want of jurisdiction at the trial:

(a) Because the action, if any existed, was *ex contractu* and the court had no jurisdiction of the parties to the bond.

Whatever the issue remaining after the proceedings in the County Court, it stemmed from and was grounded upon the bond. The obligations of a surety arise only from positive contract and are legal and not equitable. Equity will not hold a surety liable where he has been discharged at law.

> "That equity will not hold a surety liable, where he is discharged at law, seems to be well settled both in England and in this country, as a reference to a few of the decisions on this subject will fully show. In *Wright* v. *Russel*, 3 Wilson 530, it is said, 'that courts of equity are favorable to sureties, and where they are not strictly bound at law, equity will not bind them.' And in *Simpson* v. *Field*, 2 Ch. Cas. 22, it was held 'that, where a surety is not bound at law, he will not be made liable in equity.' In the case of *Waters* v. *Riley*, 2 Harris & Gill 310, the Court of Appeals of Maryland say: 'A surety is bound only by the bond itself, and is not under a moral obligation to pay; equity will not therefore interfere to charge him beyond his legal liability.' The same doctrine is established by the Court of Appeals of Virginia, in *Harrison* v. *Field's Ex.*, 2 Washington 136, and by the Supreme Court of Pennsylvania in *Weaver* v. *Shryock*, 6 S. & R. 206, and *Kennedy* v. *Carpenter*, 2 Wharton 361." *U. S.* v. *Price*, 9 How. 83, 13 L. Ed. 56.

Sureties are not liable beyond the terms of their contract.

Presumptions or equities are never allowed to enlarge or in any degree to change their legal obligations. *Leggett* v. *Humphreys,* 21 How. 66, 16 L. ed. 50; *Southwestern Surety Ins. Co.* v. *U. S. Fidelity & Guaranty Co.,* 182 P. 522, 75 Okl. 232; *Logan* v. *Hopkins,* 205 P. 1095, 85 Okl. 278.

A compensated corporate surety has no equitable interest in the funds derived from the contract covered by the bonds. *N. O. Nelson Mfg. Co.* v. *McDougal,* 43 P. (2d) 399, 171 Okla. 477; *Metropolitan Casualty Ins. Co. of N. Y.* v. *United Brick & Tile Co.,* 167 Okl. 402, 29 P. (2d) 771. In the latter case, which involved a claim by the insurance company upon an insolvent construction company's bond that it had such an equity in the moneys received from the execution of the contract, that it was in equity entitled to have them applied to the satisfaction of the indemnified obligations rather than to the prior debts of the principal, the Supreme Court of Oklahoma decided the surety obtained no such equity in the property of its principal. The following is quoted from the opinion, which is itself an exhaustive brief upon the question:

> "In view of the above authorities and the public policy as announced by Section 10613, O. S. 1931, and Section 10983, O. S. 1931, we are constrained to hold that the contract price is subjected to no equity in favor of the surety as against materialmen furnishing material for the construction of said project unless such equity arises in a proper manner by contract between the surety and said contractor, of which contract the materialmen are required by other provisions of law to take notice. The purpose of requiring the execution of said bond was to relieve materialmen of anxiety concerning payment of the indebtedness for furnishing material used in the construction

of public works. The bond is an unconditional guaranty of payment and the compensated surety places itself in the position of peril voluntarily and assumes the risk incident to the default of the contractor in paying his obligations. To hold otherwise would strike down the manifest purpose of said bond and would enable contractors in public works to thwart the just claims of materialmen who are creditors."

It is apparent that the issue tendered was liability at most upon a contract, for if its obligation involved no equitable liabilities, it was not entitled to exoneration from contingent equitable demands for they were non-existent.

The only service had or attempted upon E. A. Kelleam was non-resident service under the provisions of 28 U. S. C. A., Sections 115, 116 and 118. The provisions of these sections, which are so familiar that they do not require quotation, apply only to local and not transitory causes of action, *Kansas Gas, etc.*, v. *Wichita Natural Gas Co.* (C.C.A. Kan.), 266 F. 614, and where a specific *res* is involved. *Creager* v. *P. F. Collier & Son Co.*, 36 F. (2d) 781.

"We think there is no basis for the contention that the section contemplates the exercise of jurisdiction by a federal court upon the assumption of its control over property where there is no property subject to control within the jurisdiction. In other words the power conferred rests upon a real, not an imaginary, base. This being true, we are of opinion that a federal court has not jurisdiction over a person not within its territorial jurisdiction, or over property in the custody of such person, not within such territorial jurisdiction, merely because a state court may, as to such person and such property, because of some proceeding pending before it, have the

authority to treat both the persons and property as constructively present and subject to its jurisdiction. The power which a state court may exert in a particular contingency affords no basis for the assumption that the act of Congress extends to a subject which the language of the act does not embrace." *Chase* v. *Wetzlar*, 225 U. S. 79, 32 S. Ct. 659, 56 L. ed. 990.

"Section 57 (of the Judicial Code (28 U. S. C. A., para. 118)) provides for constructive service of process by service of publication of a warning order and hence cannot apply to actions *in personam* where jurisdiction over the person of the defendant is essential.[8] ([8]*Kansas Gas & E. Co.* v. *Wichita Natural G. Co.* (C.C.A. 8), 266 F. 614, 617; *Jones* v. *Gould* (C.C. Ohio), 141 F. 698, *Id.* (C.C.A. 6), 149 F. 153; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565.)

"The presence of the property, real or personal, within the district of suit is essential to the exercise of the limited jurisdiction conferred by Section 57. *Critchton* v. *Wingfield*, 258 U. S. 66, 74, 42 S. Ct. 229, 66 L. Ed. 467; *Chase* v. *Wetzlar*, 225 U. S. 79, 86, 32 S. Ct. 659, 56 L. Ed. 990." *Wilhelm* v. *Consolidated Oil Corp.*, 84 F. (2d) 739.

(b) The federal court had no jurisdiction of the asserted cause of action because of the prior judgment and decree of the state court.

As previously stated, when the decree of the United States District Court was entered the issues had been concluded by a prior judgment of the County Court decreeing heirship and ordering distribution and by a judgment of the County Court in a direct attack upon its decree of heirship wherein the identical issues were considered and passed upon by the County Court. Authorities hereinabove cited show that under the Constitution and

laws of Oklahoma it is settled that exclusive original jurisdiction of probate matters is vested in the County Court and that jurisdiction of the state courts of general jurisdiction is appellate only.

Equally well settled in the federal courts is the proposition that where a cause has been determined in a state court of original jurisdiction and is pending on appeal in the state tribunals, federal jurisdiction cannot attach other than by an appeal to the courts of last resort of the state and thence to the Supreme Court of the United States upon writ of error or certiorari and even here the subject matter reviewable is expressly limited by federal law. The inferior courts have failed to note the distinction between appellate and original jurisdiction of federal district courts, obviously designed to prevent complications such as disclosed by the record. 28 U. S. C. A. 344 (Judicial Code, Sec. 237, amended) governs. So far as material the section reads:

> "*Appellate jurisdiction of decrees of state courts; certiorari.* (a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error.
> * * *
>
> (b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judg-

ment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; * * * the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; * * *."

The federal courts do not have general appellate jurisdiction but limited jurisdiction under this section. *Waters-Pierce Oil Co.* v. *Texas* (Tex. '09), 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417; *Roller* v. *Murray,* 234 U. S. 738, 37 S. Ct. 902, 59 L. ed. 1570. The latter case holds that the proper mode of obtaining a review of a decision of a state court is not by attacking the judgment collaterally but by prosecution of a writ of error under the Judicial Code, para. 237.

An adjudication in a state court, whether right or wrong, precludes the parties until it has been reviewed or set aside. *County of Scotland* v. *William Hill,* 132 U. S. 107, 10 S. Ct. Reps. 86, 33 L. ed. 261; *Tioga Ry. Co.* v. *B. & C. R. R. Co.,* 20 Wall. 137, 22 L. ed. 331; *Houston* v. *Moore,* 5 Wheat. 1, 5 L. ed. 19; *Mitchell* v. *First National Bank,* 180 U. S. 471, 21 S. Ct. 418, 45 L. ed. 627.

In the case last cited an attempt by the real parties in interest was made first to litigate a claim in the state courts while the same cause of action was pending in the federal courts and thereafter to assail collaterally the judgment of the state court. The law required presentation of the matter to the state court as a condition precedent to

assertion of an interest in an estate there being administered. Conflicting determinations of state courts regarding the same issue further complicated the rights of the parties. Touching the situation, this court say:

"In the view we take of this case it is not necessary to inquire whether the liability of Mrs. Mitchell under the writing of February 20th, 1891, was determinable by the laws of Connecticut or by the laws of Illinois. If, as the bank contends, that writing became a contract when delivered to the bank in Illinois, and not before, and if, as is also contended, Mrs. Mitchell was liable thereon by the laws of that state, although she was a married woman at the time of signing the writing in Connecticut where she resided, the question remains whether the parties were not concluded by the final judgment of the Hartford county superior court based upon the judgment rendered in the supreme court of errors of Connecticut. There can be no doubt that the identical question now presented—namely, as to the liability of Mrs. Mitchell on the writing in suit notwithstanding her coverture—arose in the superior court upon appeal from the allowance of the bank's claim by the probate court; and, as we have seen, the parties united in the request that the case be reserved for the advice of the supreme court of errors of Connecticut, and the latter court, upon full consideration, advised the disallowance of all and every part of the bank's claim. To that advice the superior court, as it was compelled to do by the laws of Connecticut, conformed in its final adjudication of the bank's claim. The bank then turned to the federal court as if nothing had been adjudicated in the courts of Connecticut, and sought a judgment in support of the same claim that had been rejected by the state court in the case between it and the trustee of the estate of Mrs. Mitchell.

"We are of opinion that the bank was concluded by the judgment in the state court. In the recent

case of *Southern P. R. Co.* v. *United States*, 168 U. S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18, 27, we said, after an extended examination of the adjudged cases, that a 'right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect to all matters properly put in issue and actually determined by them.' The authorities cited in the margin illustrate the rule.

"It is said that the question here presented was one of general jurisprudence, involving the rights of citizens of different states, and that the circuit court was not bound to accept the views of the state court, but was at liberty, indeed under a duty, to follow its own independent judgment as to the legal rights of the parties. *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. If it were true that the question was in whole or in part one of general law, the thing adjudged by the state court, when properly brought to the attention of the circuit court, would still be conclusive between the same parties or their privies. Whatever may be the nature of a question presented for judicial determination—whether

depending on federal, general, or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed." *Mitchell* v. *First National Bank, supra.*

Even before the County Court's judgment became final, subject only to reversal or modification upon appeal, the court having first acquired jurisdiction was entitled to proceed. *Wabash R. Co.* v. *Adelbert College,* 208 U. S. 38, 52 L. ed. 379; *Peck* v. *Jenness,* 7 How. 612, 12 L. ed. 841; *Sharon* v. *Terry* (C.C.), 13 Sawry. 387, 36 F. 337, 131 U. S. 40, 33 L. ed. 94, 9 Sup. Ct. Rep. 705.

Unseemingly conflicts in authority between state and federal authority should be avoided. *Looney* v. *Western Texas R. R. Co.,* 274 U. S. 214, 62 L. ed. 1084, 38 Sup. Ct. Rep. 460; *Penn. General Casualty Co.* v. *Penn.,* 294 U. S. 189, 79 L. ed. 850, 55 Sup. Ct. Rep. 386.

The federal judiciary has no control over questions, when once the state courts have acquired jurisdiction, until the state has finally exhausted its judicial power over them by a final decision in the highest tribunal. 14 Am. Jur., Sec. 249, p. 445, citing *U. S.* v. *Bank of N. Y. & T. Co.,* 296 U. S. 463, 80 L. ed. 331, 56 S. Ct. 343; *State* v. *Bachelder,* 5 Minn. 223 Gil. 178, 80 Am. Dec. 410. Annotation: 5 L. R. A. 222.

In the former case it was decided that a federal court should refuse to entertain a suit even where brought by the United States and involving federal questions where a proceeding for its determination was pending in the state court; that even where federal court had acquired jurisdiction prior to the state proceedings, the character

and adequacy of the remedy of the latter proceedings in relation to the administration of assets within the estate and the status of those assets might require that jurisdition of the federal court be relinquished in favor of the state administration.

> "The principle, applicable to both federal and state courts, that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted. It applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature, where, to give effect to its jurisdiction, the court must control the property. *Farmers' Loan & T. Co.* v. *Lake Street Elev. R. Co.*, 177 U. S. 51, 61, 44 L. ed. 667, 671, 20 S. Ct. 564. If the two suits are *in rem* or *quasi in rem*, so that the court must have possession or control of the *res* in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other. *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 195, 79 L. ed. 850, 855, 55 S. Ct. 386. This principle is applied in the discharge of the long recognized duty of this court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the states and of the Union, so that they may cooperate as harmonious members of a judicial system co-extensive with the United States.' *Taylor* v. *Carryl*, 20 How. 583, 595, 15 L. ed. 1028, 1032. See, also, *Peck* v. *Jenness*, 7 How. 612, 625, 12 L. ed. 841, 846; *Buck* v. *Colbath*, 3 Wall. 334, 341, 18 L. ed. 257, 260; *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 S. Ct. 182; *Palmer* v. *Texas*, 212 U. S. 118, 129, 53 L. ed. 435, 439, 29 S. Ct. 230; *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 89, 67 L. ed 871, 876, 43

S. Ct. 480; *Harkin* v. *Brundage*, 276 U. S. 36, 43, 72 L. ed. 457, 460, 48 S. Ct. 268." *U. S.* v. *Bank of New York and Trust Co., supra.*

(c) The U. S. District Court of the Northern District had no venue of the parties.

Neither the surety nor the defendant Kelleam were residents of nor served within the Northern District. In *Employers' Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 289, a citizen of Texas sued a corporate citizen of Missouri in a state court of Gregg County, Texas, to recover in excess of $3,000, exclusive of interest and costs, upon a workmen's compensation insurance policy, and caused process to be issued and served upon an alleged agent of the defendant. Proof was submitted that the alleged agent was not an agent in fact and the service set aside, after which process was issued and served upon the defendant within the Western—not Eastern—District of Texas. The defendant appearing specially challenged service because made outside the court's territorial jurisdiction. Regarding the validity of such service, this court say:

"The suit was *in personam* and not within any exceptioned provision empowering the federal court to send its process outside its district. Therefore that court's process could be effectively served only within the district. *Toland* v. *Sprague*, 12 Pet. 300, 328-330, 9 L. ed. 1093, 1104, 1105; *New York L. Ins. Co.* v. *Bangs*, 103 U. S. 435, 439, 440, 26 L. ed. 580-582; *Munter* v. *Weil Corset Co.*, 261 U. S. 276, 279, 67 L. ed. 652, 654, 43 S. Ct. 347; *Robertson* v. *Railroad Labor Bd.*, 268 U. S. 619, 622, 623, 69 L. ed. 1119, 1121, 45 S. Ct. 621. But the state court was not subject to such a limitation and could send its process to any part of the state." *Employers Reinsurance Corp.* v. *Bryant, supra.*

(d) The suit was not a local action under 28 U. S. C. A., Secs. 116-118.

The surety had no lien upon the decedent's estate by contract or otherwise. The surety did not seek to establish a lien or interest in any part of decedent's estate to satisfy any claim of its own, but to have the distributees, Kelleam and Southard, account to the half-blood claimants. The terms of the decree show no relief *in rem* awarded the surety. Relief granted the surety was *in personam*—that the petitioners here account to the half-blood claimants and exonerate the surety on its bond (R. 78-83).

Both the Second and Fifth Circuit Courts of Appeal have held such a suit to be transitory. *Wilson* v. *Beard* (C.C.A. 5th, N. Y.), 26 Fed. (2d) 860. (This case is so clearly in point and the facts so nearly the same it is set out in full in the appendix (pp. 66 to 78, for it shows clearly the conflict between the Tenth and the Second Circuits). *Findley* v. *Florida East Coast Ry. Co.* (C.C.A. Fla. 1934), 68 F. (2d) 540, aff. (D. C. 1933) 3 F. Supp. 393, and cert. den. (1934) 54 S. Ct. 629, 292 U. S. 623, 78 L. ed. 1478.

The fifth syllabus to the last case reads:

> "Suit to impress equitable lien on testamentary trust estate held not 'local suit,' so as to permit bringing in absent defendants, where suit was not to establish lien on property within district, but was action *in personam* to compel trustees' action regarding trust (Jud. Code, Sec. 57—28 U. S. C. A., Sec. 118)."

Even an earlier decision in the Tenth Circuit is contrary to the rule announced in the case at bar. In *Wells*

v. *Helms* (C.C.A. 10th), 105 F. (2d) 402, after final adjudication of heirship in the County Court of Oklahoma County and after the administrator was discharged, a Mrs. J. N. Wells brought to trial an action against the administrator and other heirs to recover a share in the estate. The opinion points out that "on July 9, 1938, the administrator was finally discharged," and that this discharge was set up in the amended answer, filed Sept. 20, 1938. The court in the opinion say:

> "In *Commonwealth Trust Co* v. *Bradford, supra,* the court said (297 U. S. 613, 56 S. Ct. 602, 80 L. Ed. 920):
>
> > " 'Such proceedings are not *in rem*; they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution.'
>
> "Here the prayer of the complaint is too broad. Wells seeks a judgment against the administrator in his representative capacity for $6,666.67, and prays that the administrator be ordered to pay that amount to her as her portion of Wells' distributive share of Helms' estate. To grant the relief prayed for would interfere with the administration of Helms' estate in the county court and disturb its possession.
>
> "However, if the prayer of the complaint could be construed as asking for nothing more than a determination of the distributive share of Wells in Helms' estate, the result would be the same."

In the case at bar where the substantial controversy is identical, the opinion of the Circuit Court treats the action as *local,* and applies Section 116, 28 U. S. C. A. to fix jurisdiction and venue in the northern district.

It should be observed also that in the *Wells* v. *Helms* case, in which as here an administrator had been finally discharged, it was decided that to proceed would interfere with the administration of the estate by the County Court and disturb its possession. In the case at bar it is stated by the Circuit Court that:

> "No attempt is made to interfere with the administrator in possession of the estate or with the administration of the estate by the court. The estate has been administered, the estate has been distributed to those claiming to be heirs * * *."

If this action be local, as decided in *Wells* v. *Helms*, neither venue nor jurisdiction in the Northern District of Oklahoma exists. In considering the nature of the action particular attention is invited to the circumstance that a great deal of the property was notes and cash and other personalty, the situs of which was not established in the record.

The jurisdiction to enforce a lien given by this section means a lien existing anterior to the suit and not one caused by the institution of the suit itself. *Dormitzer* v. *Ill., etc., Bridge Co.* (C.C.A. Mass. 1881), 6 F. 217; *Albert* v. *Bascom* (D. C. Tex. 1917), 245 F. 149.

A creditor cannot, where he was given no lien by contract, justify maintenance of suit in District Court other than in district of residence on the ground that it was to enforce a lien upon specific personal propery in the district. *Bank of Commerce & Trust of Richmond, Va.* v. *McArthur* (D. C. Fla.), 248 F. 138; *Vidal* v. *South American Securities Co.* (C.C.A. N. Y. 1922), 276 F. 855; *Shainwald* v. *Lewis* (D. C. Neb.), 5 F. 510, affirmed 2 S. Ct. 385, 108 U. S. 158, 27 L. ed. 691.

(e) The bill stated no cause of action within either the legal or equitable jurisdiction of the court.

The Act of March 3, 1875 (18 Stat. at L. 472, chap. 137, Sec. 5; Judicial Code, Sec. 37, U. S. C. A., title 28, Sec. 80), provides that if in any suit commenced in a federal district court it shall appear to the satisfaction of the court that such suit does not really and subsantially involve a dispute or controversy properly within its jurisdiction, or that the parties to such suit have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court shall proceed no further therein, but shall dismiss the suit. *McNutt* v. *General Motors Accept. Corp.*, 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135.

The effort is here made to sustain jurisdiction under the equity powers of the court upon the theory that the bill states an action in the nature of a bill *quia timet.* No case can be found where such a contention under facts as here has ever been sustained. Cases from other jurisdictions are not in point, for the matter is governed by local law.

The Oklahoma statutes in certain exceptional cases authorize a surety to maintain an action against his principal for indemnity against the liability for which he is bound before it is due. The section reads:

> "A surety may maintain an action against his principal, to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist upon which, by the provisions of this code, an order may be made for arrest and bail, or for an attachment. (R. L. 1910, Sec. 5308.)" 12 O. S. A. 1108.

But this section has no application where the surety has been discharged by two judgments and is merely tendering a feigned issue in an effort to invoke federal jurisdiction. The right to maintain such a suit is clearly limited by the words "whenever any of the grounds exist upon which, by the provisions of this code, an order may be made for arrest and bail, or for an attachment."

Under the Oklahoma code no order may be made for the arrest of any person save where a verified complaint charging a public offense is laid before a magistrate. The applicable section reads:

> "When a complaint, verified by oath or affirmation, is laid before a magistrate, of the commission of a public offense, he must, if satisfied therefrom that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant has committed it, issue a warrant of arrest. (R. L. 1910, Sec. 5629.)" 22 O. S. A. 171.

Note also Const., Art. 2, Sec. 30, which reads:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized."

And an order for an attachment may only be made in actions for the recovery of money and where there has been presented to the clerk of some court in which an action has been filed an affidavit showing the nature of the claim, that it is just, the amount due, and the existence of some particular ground of attachment specified in 12 O. S. A. 1151.

"The order of attachment shall be issued by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing:

First. The nature of the plaintiff's claim;

Second. That it is just;

Third. The amount which the affiant believes the plaintiff ought to recover; and,

Fourth. The existence of some one of the grounds for an attachment enumerated in the preceding section. (R. L. 1910, Sec. 483.)" 12 O. S. A., Sec. 1152.

So far as material here, Section 1151, O. S. A., to which reference is made, provides:

"The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated:

1. When the defendant, or one of several defendants, is a foreign corporation, or a non-resident of this state (but no order of attachment shall be issued on the ground or grounds in this clause stated for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose wholly within the limits of this state, which fact must be established on the trial)."

Clearly these sections do not authorize maintenance of any such suit as herein attempted, for:

1. No order of arrest could issue for no complaint had been filed nor crime committed.

2. The action is not for the recovery of money and attachment is unauthorized.

A party can ask no greater relief in equity in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former. *Ewing* v. *St. Louis,* 5 Wall. 413, 72 U. S. 808, 14 L. ed. 657; *Blythe* v. *Hinckley* (Cal. 1899), 19 S. Ct. 497, 173 U. S. 501, 43 L. ed. 783; *Sutton* v. *English,* 246 U. S. 199, 38 S. Ct. 254, 62 L. ed. 664. But it is clear from the foregoing that the surety had no cause of action either at law or in equity.

V. It was the duty of the court to sustain motion to dismiss both the bill and the cross-petition at the trial for want of jurisdiction for:

(a) The burden was upon the persons asserting jurisdiction in the federal court for diversity of citizenship to establish diversity, which was not done.

The Circuit Court concedes the allegation of residence in the pleadings and evidence is not equivalent to an allegation of citizenship in the state, but asserts where the averment of residence was intended to mean and, reasonably construed, must be interpreted as meaning, that the party is a citizen of a state, it is sufficient. But in analyzing the facts the court limits its review to the evidence regarding residence of the *surety* and the *petitioners* herein. The *citizenship of the half-blood claimants was equally material, as the cases hereinafter cited clearly show.* The allegation as to citizenship of all except Kelleam Hall is that they "* * * *are residents and citizens of the State of Arkansas and the State of Oklahoma, the exact addresses of each this plaintiff does not know and cannot give* * * *" (R. 5). The proof was that "all * * * *half-brothers and sisters live in either Oklahoma,*

Arkansas or California'' (R. 109). The allegation of the petition was traversed in the answers (R. 50).

The court's findings were generally that there was a diversity of citizenship between the Maryland Casualty Company and the defendants and cross-petitioners (R. 68), but specifically that the *residences* of the half-blood claimants were Milwaukee, Wisconsin, Yorbalinda, California, Santa Anna, California, Long Beach, California, Fort Smith, Arkansas, Galveston, Texas, Los Angeles, California, Alhambra, California, Waldron, Arkansas, Fayetteville, Arkansas, Blanchard, Oklahoma, Amarillo, Texas, Oklahoma City, Oklahoma. Robert Kelleam's *residence* was found merely to be ''Texas'' and there was no finding as to the *residence* of Kelleam Hall. These residences are in the main supplied by counsel who drew the journal entry. They were not established by any evidence.

In view of this confused state of the record, this case cannot be brought under the rule in *Sun Printing and Publishing Assn.* v. *Edwards,* 194 U. S. 377, 24 S. Ct. 696, 48 L. ed. 1027.

In that case the jurisdictional issue turned upon the sufficiency of detailed evidence regarding the citizenship of Edwards, the plaintiff. Regarding the law the court say:

> ''Had the transcript shown nothing more as to the status of Edwards than the averment of the complaint that he was a 'resident of the state of Delaware,' as such an averment would not necessarily have imported that Edwards was a citizen of Delaware, a negative answer would have been impelled by prior decisions. *Mexican C. R. Co.* v. *Duthie,* 189 U. S. 76, 47 L. ed. 715, 23 Sup. Ct. Rep. 610; *Horne*

v. *George H. Hammond Co.*, 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; *Denny* v. *Pironi*, 141 U. S. 121, 35 L. ed. 657, 11 Sup. Ct. Rep. 966; *Robertson* v. *Cease*, 97 U. S. 646, 24 L. ed. 1057. The whole record, however, may be looked to, for the purpose of curing a defective averment of citizenship, where jurisdiction in a federal court is asserted to depend upon diversity of citizenship, and if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which, in legal intendment, constitute such allegation, that is sufficient. *Horne* v. *George H. Hammond Co.*, 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167, and cases cited."

The court from the evidence which was direct and positive (but with three justices dissenting) found sufficient proof of citizensip from the facts that (1) the complaint averred and the answer admitted that the plaintiff was a resident of the State of Delaware. (2) The plaintiff testified: "One of the reasons I left the New Haven Palladium (place of employment in New York) was that it was too far away from home. I live in Delaware and I had to go back and forth. My family were over in Delaware."

No question of jurisdiction was raised in the trial or by assignment of error, and this court adjudged the proof there sufficient.

In the case at bar the court's findings and the allegations of the pleadings and the proof are in hopeless confusion even as to the facts regarding the place of *residence* of the several respondents, except the surety. Contrary to the assertion in the opinion of the Circuit Court the petitioners' complaint is not limited to their own citizenship and that of the surety. (See assignment of errors R. 1.)

The Constitution, Art. 3, Sec. 2, provides:

> "The judicial power shall extend to all cases in law and equity * * * between citizens of different states * * *."

> "But it has long since been settled that residence and citizenship were wholly different things within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the circuit courts of the United States; and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purpose of jurisdiction." *Steigleder* v. *McQuesten*, 49 L. ed. 987, 198 U. S. 143, 25 S. Ct. 616.

To the rule announced Mr. Justice Harlan cites:

Parker v. *Overman*, 18 How. 137, 15 L. ed. 318.
Robertson v. *Cease*, 97 U. S. 646, 24 L. ed. 1057.
Everhart v. *Huntsville Female College*, 120 U. S. 223, 30 L. ed. 623, 7 Sup. Ct. Rep. 555.
Timmons v. *Elyton Land Co.*, 139 U. S. 378, 35 L. ed. 195, 11 Sup. Ct. Rep. 585.
Denny v. *Pironi*, 141 U. S. 121, 123, 35 L. ed. 657, 658, 11 Sup. Ct. Rep. 966.
Wolfe v. *Hartford Life & Annuity Ins. Co.*, 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602.

Under the Oklahoma law the answer put in issue the allegation of jurisdictional as well as non-jurisdictional facts. 12 O. S. A. 269 (R. L. Sec. 4742). The answer does not waive such questions even where not traversed, but they may be raised at any stage of the proceedings. *Antene* v. *Jensen*, 47 Okla. 352, 148 Pac. 727; *Blake* v. *Metz*, 136 Okla. 150, 276 Pac. 765; *Zahn* v. *Obert*, 60 Okla. 118, 159 Pac. 298.

The cases of *Anderson* v. *Watt*, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078, and *Desmare* v. *U. S.*, 93 U. S. 605, 23 L. ed. 959, do not support the Circuit Court's statement that proof of residence at a given place shifts the burden of proof as to citizenship. The point appears not to have been considered in either case. On the contrary in *Anderson* v. *Watt* the following language appears:

> "Under the Act of March 3, 1875, determining the jurisdiction of circuit courts of the United States (18 Stat. 472), the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted. Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the circuit court to dismiss the suit; and this court, on appeal or writ of error, must see to it that the jurisdiction of the circuit court has in no respect been imposed upon. *Morris* v. *Gilmer*, 129 U. S. 315, 325 (32:690, 693); *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.*, 136 U. S. 356, 374 (34:363, 367); *Cameron* v. *Hodges*, 127 U. S. 322, 325 (32:132, 133).
>
> "Although the Fourteenth Amendment declares all citizens of the United States to be citizens 'of the state where they reside,' yet as the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears, it is essential that in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctively and positively averred in the pleadings, or should appear affirmatively with equal distinctness in other

parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. *Robertson* v. *Cease,* 97 U. S. 646, 649 (24:1057, 1058); *Brown* v. *Keene,* 33 U. S. 8 Pet. 112, 115 (8:885, 886). It was therefore held in *Robertson* v. *Cease, supra; Continental Ins. Co.* v. *Rhoads,* 119 U. S. 237 (30:380); *Menard* v. *Groggan,* 121 U. S. 253 (30:914), and other cases, that the averment that the parties to the cause were 'residents' in different states, respectively, was not enough. * * *."

(b) There was no complete diversity of citizenship between the real parties in interest as required by 28 U. S. C. A. 111-112.

The real parties in interest were the claimants to a share of the estate. At most the surety sought only to have the heirs compose their differences for fear in some manner and at some time it might become involved in a suit growing out of the bond. Since in any suit upon the bond the principal, E. A. Kelleam, and the surety would be aligned in interest against the heirs, it was the duty of the court in order to test its jurisdiction to realign the parties in accordance with their actual interests.

> "If in any suit commenced in a district court * * * of the United States, it shall appear * * * at any time * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties * * * have been improperly or collusively made or joined * * * for the purpose of creating a case cognizable * * * the said district court shall proceed no further therein but shall dismiss the suit * * *." 28 U. S. C. A., Sec. 80.

To sustain jurisdiction in federal courts because of diversity of citizenship, all parties on one side must be citizens of different states from all parties on the other side. *Edwards, et al.* v. *Glasscock, et al.*, 91 F. (2d) 625.

> "As respects jurisdiction based on diversity of citizenship, district court was required to look beyond pleadings and arrange parties according to their actual sides in dispute." *Edwards, et al.* v. *Glasscock*, citing *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713.

From the latter case a bill in equity was brought in the federal court by the mortgagee of a water works company to restrain the city in which the company supplied water from building a new set of water works and to compel it specifically to perform a contract with the company to pay it or its mortgagee a specified sum for the use of water. The trust company was a Pennsylvania corporation and federal jurisdiction was asserted for diversity of citizenship. The water works company was made a defendant. The answer averred that the real purpose of the proceeding was to invoke federal jurisdiction in an effort to avoid the effect of decision by the Supreme Court of the state to the effect that the contract relied upon was void. If mortgagor and mortgagee, both interested in obtaining the relief sought, were enjoined as plaintiff there would be no diversity of citizenship; the effort was made to make the mortgagor a defendant along with the city. This court say:

> "We are of opinion that the bill should have been dismissed for want of jurisdiction. The water-works company is admitted to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the court will look beyond the pleadings, and arrange the par-

ties according to their sides in the dispute. When that is done, it is obvious that the waterworks company is on the plaintiff's side, and was made a defendant solely for the purpose of reopening, in the United States court, a controversy which had been decided against it in the courts of the state. There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill. On the contrary, it appears from those allegations that the waterworks company insisted on its contract with the city, and did everything in its power to carry the contract out. It also recognized the plaintiff's right to receive the rentals, and yielded to its demand. No difference or collusion of interest or action is alleged or even suggested. If we assume that the plaintiff is more than an assignee of the city's contract to pay (which we do not intimate), still, when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed. See Removal Cases (*Meyer* v. *Delaware R. Constr. Co.*), 100 U. S. 457, 469, 25 L. ed. 593, 598; *Hawes* v. *Oakland* (*Hawes* v. *Contra Costa W. Co.*), 104 U. S. 450, 453, 26 L. ed. 827, 829; *Detroit* v. *Kean*, 106 U. S. 537, 541, 27 L. ed. 300, 302, 1 Sup. Ct. Rep. 560; *Doctor* v. *Harrington*, 196 U. S. 579, ante, 606, 25 Sup. Ct. Rep. p. 355. Act March 3, 1875 (18 Stat. at L. 472, chap. 137, sec. 5, U. S. Comp. Stat. 1901, p. 508)."

To the same general rule is *McNutt, Governor,* v. *General Motors Acceptance Corp. of Indiana,* 298 U. S. 178, 80 L. ed. 1135.

When the parties to the suit at bar are arranged in accordance with their actual interest, it is apparent that the controversy involves residents of the State of Okla-

homa, both as plaintiffs and defendants, and that therefore there was no jurisdiction in the District Court. *Gaddies, et al.* v. *Junker* (D. C.), 27 F. (2d) 156; *De Graffenreid* v. *Yount-Lee Oil Co.* (C. C. A.), 30 F. (2d) 574; *Mitchell* v. *Maurer*, 293 U. S. 237, 55 Sup. Ct. 162, 79 L. ed. 338.

(c) The relief prayed and granted was *in personam* against non-residents of the Northern District and was beyond the jurisdiction of the court.

1. *The petitioners were neither inhabitants of nor found within the Northern District in which the suit was brought and who did not voluntarily appear and as to them the decree is void.*

For venue in the Northern District, as above noted, respondents depended solely upon the circumstance that Francis Kelleam, who resided in Sallisaw, Sequoyah County, which is in the Eastern District (28 U. S. C. A. 182) of Oklahoma, was *served* in the Northern District.

Title 28, Sec. 111, U. S. C. A. (Jud. Code Sec. 50) reads:

> "*When part of several defendants can not be served.* When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhab-

itants of nor found within the district, as aforesaid, shall not constitute matter or abatement or objection to the suit (R. S. Sec. 737; Mar. 3, 1911, c. 231, Sec 50, 36 Stat. 1101)."

Title 28, U. S. C. A., Sec. 118, provides:

"*Absent defendants* * * *. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon * * * real or personal property within the district where the suit is brought, one or more of the defendants shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto * * *. It shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication * * * but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same state, such suit may be brought in either district in said state."

The court below in its decree assumed authority in what it treated as a local action upon non-resident service where there was no complete diversity of citizenship:

1. To vacate a decree of heirship.

2. To direct an accounting.

3. To determine personal liability of an administrator upon a judicial bond without any service upon the administrator.

4. To establish and foreclose a lien to satisfy an accounting not concluded.

5. To vacate conveyances without service upon the grantees.

6. To void a judgment of the County Court determining the same issue.

7. To appoint a receiver for a decedent's entire estate consisting of real and personal property where no proof was offered to show its situs within the state or district.

The case was not one where venue was waived for want of venue was urged uniformly throughout the proceedings (R. 1-43-50-57), and to avoid possibility of waiver, defendants stood on their pleas to jurisdiction and venue at the trial (R. 113).

Whenever a decree cannot be made without prejudice to one not a party, the bill must be dismissed. *Fourth Nat. Bank* v. *New Orleans & C. R. Co.* (La. 1871), 11 Wall. 624, 20 L. ed. 82; *Herndon* v. *Ridgeway* (Miss. 1855), 17 How. 424, 15 L. ed. 100. All partners were held indispensable in a suit involving partnership property in the former case; in the latter all parties claiming an interest in certain slaves were held indispensable, and where all could be served the bill was dismissed.

In a suit by one of testators to surviving children to recover one-third of the estate on the ground of the invalidity of a will, plaintiff's brother and other legatees, including the testator's sister, niece, and friend, were indispensable parties. *O'Brien* v. *Markham* (Cal.), 17 Fed. Supp. 633. To the same rule is *Shields* v. *Barrow*, 17 How. 130, 15 L. ed. 130; *Ribon* v. *R. R. Co.*, 17 Wall. 446, 21 L. ed. 367, and (in Oklahoma) *Simon* v. *Shaffer* (D. C. Okla. 1935), 11 F. Supp. 450.

2. *Because jurisdiction was predicated upon diversity of citizenship and neither plaintiff nor any defendant was a resident of the district, and objection was made by the petitioners.*

As hereinbefore noted, relief prayed and granted was *in personam*. The petitioners here were indispensable parties and no party was a resident of the district where suit was instituted.

Title 28, U. S. C. A., Sec. 112, reads in part:

"* * * (a) Except as provided in Sections 113 to 117 of this title,* no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in Sections 113 to 118 of this title, no civil suit shall be brought in any district against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

By express provision of this section jurisdiction cannot be predicated on diversity of citizenship, where

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* Neither of these exceptions apply. Sec. 113 provides for suit in the district where either of several defendants reside, where there is more than one district and all defendants reside in the state. Not applicable because (1) neither party to this case resides in the Northern District; (2) some reside without the state and foreign service is not authorized.

Sec. 114 governs venue and transfers of criminal cases between districts in the same state where one or more defendants resident in the state are involved.

Sec. 115 applies where the suit is of a local nature and the defendant a resident of another district in the same state, authorizing issuance and service of process.

Sec. 116 governs local suits where part of the property is in one district and part in another within the same state, and Sec. 117 relates to jurisdiction of a receiver where property is in the same judicial circuit but in different states.

neither party is resident of district and objection is made by the defendant.

Luckett v. *Delpark, Inc.* (N. J. 1926), 46 S. Ct. 397, 270 U. S. 496, 70 L. ed. 703.
Ladew v. *Tenn. Copper Co.* (Tenn. 1910), 218 U. S. 357, 31 S. Ct. 81, 54 L. ed. 1069.
In re Wisner (Mo. 1906), 203 U. S. 449, 27 S. Ct. 150, 51 L. ed. 264.
Foulk v. *Gray* (W. Va.), 120 Fed. 156.
Albert v. *Bascom* (D. C. Tex. 1917), 245 F. 149.

To the same effect is *Wilhelm* v. *Consolidated Oil Corp.* (C.C.A. Okla. 1936), 84 F. (2d) 739, from this Circuit.

From *Wilhelm* v. *Consolidated Oil Corp., supra,* the following is quoted:

> "There is another reason why a decree granting the primary relief must be had in a suit *in personam.* Section 57 itself provides that an adjudication thereunder shall 'affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district.' This has been treated as a substantive limitation upon the jurisdiction conferred, as well as a direction as to the character of the decree. *Ladew* v. *Tennessee Copper Co.,* 218 U. S. 357, 31 S. Ct. 81, 54 L. ed. 1069; *General Investment Company* v. *Lake Shore & M. S. Ry. Co.,* 260 U. S. 261, 280, 281, 43 S. Ct. 106, 67 L. ed. 244. See, also, *Chase* v. *Wetzlar,* 225 U. S. 79, 86, 32 S. Ct. 659, 56 L. ed. 990; *Crichton* v. *Wingfield,* 258 U. S. 66, 74, 42 S. Ct. 229, 66 L. ed. 467."

Jurisdiction of federal court in actions *in personam* is limited to district of which defendant is an inhabitant

and not affected by fact that service is had upon one party within the district.

Putnam v. *Ickes* (1935), 78 F. (2d) 223, 64 App. D. C. 339, cert. den. (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434.

Lassig v. *Ickes* (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434.

Dunn v. *Ickes* (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434.

Abbott v. *Ickes* (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434.

Hill v. *Ickes* (1935), 56 S. Ct. 132, 296 U. S. 612, 80 L. ed. 434.

Thompson v. *Ickes* (1935), 56 S. Ct. 133, 296 U. S. 612, 80 L. ed. 434.

Hull v. *Ickes* (1935), 56 S. Ct. 133, 296 U. S. 612, 80 L. ed. 434.

Fordham v. *Ickes* (1935), 56 S. Ct. 133, 296 U. S. 612, 80 L. ed. 434.

Conclusion.

For the reasons hereinabove set forth, it is respectfully submitted that the decree herein complained of and opinion of the U. S. Circuit Court of Appeals for the Tenth Circuit should be reversed with directions to dismiss the bill at the costs of the respondents and relief is respectfully prayed accordingly.

GLENN O. YOUNG,
Sapulpa, Oklahoma,
Attorney for Petitioners.

Dec. 14, 1940.

APPENDIX.

"WILSON v. BEARD, ET AL.

Circuit Court of Appeals, Second Circuit,
June 4, 1928.

No. 239.

1. *Courts—Right of action for deceased's negligence in handling estate of incompetent held not within law authorizing suit to enforce lien on property within district* (Jud. Code, Sec. 57 (28 USCA, Sec. 118)).

Right of action on unliquidated claim against estate of decedent, grounded on decedent's negligence in permitting estate of incompetent to depreciate in value during his years of management, but not charging him with misappropriation thereof, held, *in personam*, and not within Judicial Code, Sec. 57 (28 USCA, Sec. 118), authorizing suit in any District Court of United States to enforce legal or equitable lien, or to remove any incumbrance or lien or cloud on title to real or personal property within district.

2. *Executors and administrators—Creditor has right to share in debtor's estate only after claim is recognized by executor or administrator, or established by judgment.*

Under rule to effect that, where a debtor dies, his estate is impressed with a trust for benefit of his creditors, heirs, and legatees, creditor has right to share in debtor's estate only after claim is recognized by executor or administrator, or is established by judgment.

3. *Courts—Existence of property belonging to deceased within district cannot be used as basis for bringing suit on claim therein.*

Where claim against estate is not of a special nature, or differing from that of any other general creditor, or anyone having a right to sue for tort, creditor cannot, because of existence of property within district, use that as a basis for bringing suit within district against a defendant who is not an inhabitant of the district or found therein.

4. *Courts—Claim of heirs for residue does not constitute 'suit affecting property,' within law authorizing jurisdiction of court within district where property is located* (Jud. Code, Sec. 57 (28 USCA, Sec. 118)).

Claim of heirs, suing a trustee to recover residue of an estate, does not constitute a suit affecting real or personal property within district, within meaning of Judicial Code, Sec. 57 (28 USCA, Sec. 118), authorizing suit to enforce lien on or remove incumbrance, lien, or cloud on title to property within district where suit is brought.

5. *Courts—Parties have personal immunity from suit in any district other than one where either of parties reside* (Jud. Code, Sec. 51 (28 USCA, Sec. 112)).

Under Judicial Code, Sec. 51 (28 USCA, Sec. 112) parties to suit in federal court have personal immunity from suit in any district other than the one where either of parties reside.

6. *Courts—Personal residence controls in determining federal court jurisdiction.*

In determining residence of parties for purpose of federal court jurisdiction, the place of parties' personal residence controls, as distinguished from official residence.

7. *Appearance—Appearance, limited to motion to dismiss, did not constitute waiver of right to ask for dismissal.*

Where appearance of defendant was limited to motion to dismiss, without seeking to raise question as to merits, there was no waiver of right to ask for dismissal.

8. *Equity—Failure to move to set aside service of subpoena held not waiver of right to ask for dismissal.*

Failure to move to set aside service of subpoena *held* not waiver of right to ask for dismissal for lack of jurisdiction; such relief being obtainable by special appearance and motion to dismiss, without asking to vacate service of process.

9. *Equity—Bill seeking recovery for deceased's negligence in handling incompetent's funds held improperly dismissed, as to person within district, on ground non-resident executor was necessary party.*

Bill against executor, seeking recovery on ground of deceased's negligence in handling assets of incompetent, brought in district wherein property belonging to deceased was located, and alleging possession by another defendant of certain sums of money belonging to such incompetent, title to which is claimed by plaintiff, *held* improperly dismissed as to such third person, claimed to have possession of funds and residing within district on ground that executor, who was a nonresident, was a necessary party.

Appeal from the District Court of the United States for the Southern District of New York.

Suit by John Taylor Wilson, as conservator and as committee of the estate of Philip A. Meyer, an incompetent, against Charles Coleman Beard, as ancillary executor

cum testamento annexo of the estate of Hugo R. Meyer, deceased, and others, to determine an amount due to the plaintiff, and to have a lien on the assets of the decedent's estate established, declaring that funds in the hands of and under control of the defendants were held in trust for the payment of a debt due the plaintiff. Decree of dismissal, and plaintiff appeals. Affirmed in part, and in part reversed and remanded.

Patterson, Eagle, Greenough & Day, of New York City (Edward J. Patterson and Carroll G. Walter, both of New York City, of counsel), for appellant.

Everett, Clarke & Benedit, of New York City (Herman S. Hertwig and Walter C. Elliott, both of New York City, of counsel), for appellees.

Before Manton, Swan and Augustus N. Hand, Circuit Judges.

Manton, Circuit Judge. The bill of complaint alleges that Henry Meyer died in 1905, a resident of Denver, Colo., leaving three children, a son, Philip A. Meyer, for whom the plaintiff has been appointed conservator and a committee of his estate, because of his incompetency, and another, Hugh R. Meyer, who has since died, and of whose estate the defendant, Charles Coleman Beard, has been named ancillary executor *cum testamento annexo*.

By his will, Henry Meyer left his estate in equal shares to his three children, and Hugo R. Meyer was named and qualified as executor, and administered the estate until May, 1927, when he filed his account and was discharged. Philip A. Meyer obtained securities of approximately $100,000 from his father's estate, and Hugo R. Meyer became a self-constituted agent or trustee for Philip A. Meyer, depositing the securities with the

predecessor of the appellee, Bankers' Trust Company. The bill alleges that in 1907 Philip A. Meyer was incompetent, but no guardian, committee, or conservator was appointed until the appellant was appointed on December 5, 1923. During this period, Hugo R. Meyer had personal charge and managed the properties of Philip A. Meyer. It is alleged that, with one exception, none of the bonds among Philip A. Meyer's securities were legal investments for trustees, and that this bond of a railroad company was purchased for Philip's account by Hugo after his father's death. For years prior to 1923, Hugo and Philip Meyer resided in the state of Victoria, Australia, where Hugo Meyer died on January 15, 1923, leaving a will which was probated in the Supreme Court of Victoria. His wife was named as executrix, and among the assets of his estate were stocks and bonds of the approximate value of $71,000, which were found in the possession of the Bankers' Trust Company. There was some personal property in Australia. In May, 1924, Hugo Meyer's wife was appointed ancillary executrix of the estate by the Surrogate's Court of New York County, and acted as such until she died, a resident of Oklahoma, on June 22, 1926.

As ancillary executrix, she advertised for claims, and the appellant presented his claim on behalf of Philip A. Meyer. The allegation is that on December 5, 1923, the probate court of Cook County, Illinois, appointed John Taylor Wilson conservator of Philip A. Meyer's estate, and on February 5, 1924, he was appointed committee by the Supreme Court of New York County. As such conservator and committee, the appellant received from the Bankers' Trust Company the securities composing the estate of Philip A. Meyer, then having a market value of

$43,000. The bill charges that the estate of Hugo R. Meyer is liable to the estate of Philip A. Meyer in the sum of $58,000, the difference between the market value of the securities received by the appellant from the Bankers' Trust Company, and the market value of the securities distributed to Philip A. Meyer from his father's estate in 1907. It is claimed, also, that income to the extent of $34,000 is due. The appellant is alleged to be the only unpaid creditor of Hugo R. Meyer's estate. When the claim was rejected by Hugo R. Meyer's widow, the appellant petitioned the Surrogate's Court of New York County to compel the ancillary executrix to settle her accounts as such executrix, to the end that the appellant's claim might be determined upon such an accounting. This application was opposed upon the ground that the Surrogate's Court was without jurisdiction to hear and determine the claim of nonresident creditors, and on June 11, 1925, the surrogate made a decree denying the appellant's petition, and directing the ancillary executrix to file an immediate accounting, and thereafter directed the transmissal of the assets to the domicilary jurisdiction (Australia) for final administration and distribution there. This result was affirmed by the Court of Appeals of the state. *In re Meyer,* 125 Misc. Rep. 361, 211 N. Y. S. 525, affirmed 216 App. Div. 735, 214 N. Y. S. 940, affirmed 244 N. Y. 598, 155 N. E. 913.

The theory upon which the appellant asserts his right to maintain this suit against a resident of Oklahoma in the Southern District of New York is that it seeks to enforce a lien against Hugo R. Meyer's estate under Section 57 of the Judicial Code (title 28, Sec. 118 of the U. S. Code (28 USCA, Sec. 118)) which provides:

'When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur by a day certain to be designated.'

(1) The section further provides, where there is a failure to appear, for service by publication, and that the adjudication shall, as regards the absent defendant without appearance, affect only the property which has been the subject of the suit and under the jurisdiction of the court within such district. The claim here does not fall within this section. It is grounded upon Hugo R. Meyer's negligently permitting the assets of Philip A. Meyer's estate to depreciate in value during his years of management, but he is not charged with misappropriation. No claim or lien for an interest in any particular property is asserted. He has an unliquidated claim *in personam* against Hugo R. Meyer in his lifetime, and claims that it survives against his representative; further, that, when it is liquidated, a decree may be entered requiring payment out of the assets of Hugo R. Meyer's estate. But it must be paid with any other general creditor of the general estate after the expenses of administering the estate have been paid. *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44, 30 S. Ct. 10, 54 L. Ed. 80; *Security Trust Co.* v. *Black River Nat. Bank*, 187 U. S. 211, 228, 23 S. Ct. 52, 47 L. ed. 147. His right of action is *in personam*, and before he has a lien he must obtain a judgment on his claim and

reach his debtor's property in the well established way. *White* v. *Croker* (C.C.A.), 13 F. (2d) 321, 323. Consequently no jurisdiction can be acquired through the aid of Section 57.

(2) But it is argued that, if the debtor dies, the personal right is gone, and the only remaining right is against the debtor's assets. Then, it is said, the property of the debtor immediately becomes a trust fund, to which he, as a creditor of the deceased, is a beneficiary, and he has 'an equitable lien upon or claim to such property.' It is, of course, the duty of executors or administrators to pay the debts of the decedent up to the limit of the amount of the estate; but this does no change the character of the liability. The rule is that, where a debtor dies, his estate is impressed with a trust for the benefit of his creditors, heirs and legatees (*Borer* v. *Chapman*, 119 U. S. 587, 7 S. Ct. 342, 30 L. ed. 532; *Harrison* v. *Moncravie* (C.C.A.), 264 F. 776, 779; *McClellan* v. *Carland* (C.C.A.), 187 F. 915, 918). But that makes it possible to share in the debtor's estate only after the claim is recognized by the executor or administrator, or is established by judgment against the executor or administrator (*White* v. *Croker, supra*).

(3) The claim at bar in effect seeks a money recovery. It is no different. The assertion of an equitable lien does not change its character. The recovery, if one he had, necessarily is an *in personam* judgment, and must be paid out of the estate, if there be sufficient property; otherwise, it remains as a judgment of record against the executor in his representative capacity. Where the plaintiff has no special claim against the property, or any right in it, to differ from any other

general creditor, or any one having a right to sue for tort, he cannot, because of the existence of property within the district, use that as a basis for bringing his suit within it against a defendant, who is not an inhabitant of the district or found in the district. *Vidal* v. *South Am. Securities* (C.C.A.), 276 F. 855.

(4) Heirs, suing a trustee to recover a residue of an estate, are in the same position; their claim does not constitute a suit affecting real or personal property within the district. *Fayerweather* v. *Ritch* (C.C.), 89 F. 385. See, also, *Waterloo Creamery Co.* v *Nat. Bank of Commerce* (D.C.), 282 F. 197. Section 57 refers to some lien upon or claim to specific property. Other creditors against an estate, having a claim of uniform validity, are entitled to share in the estate, and a single creditor, who has no specified claim to particular property, may not have the aid of the section.

We are referred to *Hultberg* v. *Anderson* (C.C.), 170 F. 657, where the complainant had a lien by virtue of an attachment sued out and final judgment entered thereon, and he was allowed to proceed under section 57 because he had a legal lien on specific property within the district. *Dahlgren* v. *Pierce* (C.C.A.), 263 F. 841, was a suit to construe a will setting up a trust and to determine the interests in the trust fund under the will. It was a proceeding *in rem* to construe a deed to reach property and remove a cloud upon the title. The whole trust estate was before the court, to have the rights of the several parties declared. The reasoning and result in *Chase* v. *Wetzlar*, 225 U. S. 79, 32 S. Ct. 659, 56 L. ed. 990, supports appellee's position, rather than appellant's. *De Hierapolis* v. *Lawrence* (C.C.), 99 F. 321, was a

typical bill to enforce a judgment lien against certain real estate, transferred with the reservation of an annuity.

In *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565, plaintiff sought to recover back property bought by the plaintiff at a sheriff's sale as a result of a judgment against the plaintiff who was the defendant in that action. The plaintiff challenged the validity of the judgment in a prior action. In that action, this plaintiff was a nonresident defendant with real property, the subject of the present suit, in Oregon. The plaintiff therein sued the defendant, without the state, by an order of publication, in a personal action, for legal services, without attachment of property or seizure thereof by the court. The plaintiff therein obtained judgment and levied execution on the defendant's property, and at the sheriff's sale the present defendant bought in the property. The court, in the present suit, gave judgment for the plaintiff on the ground that the judgment in the prior action was invalid, and hence the present defendant's title was invalid. The rule was announced that, where the action was essentially one *in personam*, jurisdiction over a nonresident may be obtained only to the extent of his property within this state, attachable and attached. 'The substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states where actions are brought against nonresidents, is effectual only where, in connection with process against the person for commencing the action, property in the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property, or affecting some interest therein; in other

words, where the action is in the nature of a proceeding *in rem.'*

The death of Hugo R. Meyer did not have the effect of changing the purely personal obligation into a direct claim against his particular assets in New York state. It was a claim against his executor or administrator in his representative capacity. Attachment or seizure of the property was unnecessary, and after judgment the property of the estate could be traced. See *Albert* v. *Bascom* (D. C.), 245 F. 149.

Both appellant and appellee reside outside of the Southern District of New York—outside the state. Under Section 51 of the Judicial Code (U. S. Code, title 28, Sec. 112 (28 U. S. C. A., Sec. 112), they have personal immunity from suit in any district other than the one where either of the parties reside. *Gen. Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 43 S. Ct. 106, 67 L. ed. 244; *Camp* v. *Gress*, 250 U. S. 308, 39 S. Ct. 478, 63 L. Ed. 997; *U. S. Fidelity & Guaranty Co.* v. *Jaeger Mfg. Co.* (C.C.A.), 1 F. (2d) 975, 977; *Haviland* v. *Atlantic Coast Line R. Co.* (D. C.), 299 F. 955. The place of the parties' personal residence controls, as distinguished from the official residence. *Amory* v. *Amory*, 91 U. S. 356, 23 L. Ed. 436; *McDuffie* v. *Montgomery* (C. C.), 128 F. 105.

(7, 8) It is argued that the appellee waived his right to ask for a dismissal below because he not only asserted his privilege of a personal suit in the District Court but urged that the court lacked jurisdiction of the subject-matter, and, further, that he failed to move to set aside the order of service of the subpoena in Oklahoma. There was no general appearance, nor was a demurrer filed, presenting arguments addressed to the jurisdiction of the court and on the merits of the case, as in *St. Louis & S.*

F. R. R. Co. v. *McBride,* 141 U. S. 127, 11 S. Ct. 982, 35 L. Ed. 659, and *Western Loan & Sav. Co.* v. *Butte & Boston Mining Co.,* 210 U. S. 368, 23 S. Ct. 720, 52 L. ed. 1101. Appellee limited his appearance to the motion to dismiss. He sought to raise no question as to the merits. *Armstrong* v. *Langmuir* (C.C.A.), 6 F. (2d) 369; *Kelley* v. *T. L. Smith Co.* (C.C.A.), 196 F. 466. Nor is there force in the claim of waiver for failure to move to set aside the service of the subpoena. This relief was obtainable by a special appearance and motion to dismiss the bill without asking to vacate the service of process. *Camp* v. *Gress,* 250 U. S. 308, 39 S. Ct. 478, 63 L. Ed. 997; *Ladew* v. *Tenn. Cooper Co.,* 218 U. S. 357, 31 S. Ct. 81, 54 L. Ed. 1069. The court properly dismissed the bill as against this appellee.

(9) The twenty-sixth paragraph of the complaint alleges that the Bankers' Trust Company paid to the appellee, E. H. Rollins & Sons, sums of money which were the property of Philip A. Meyer, and at the time of the death of Hugo R. Meyer, E. H. Rollins & Sons had on hand or shortly thereafter received these moneys, and that they still hold the property within the Southern District of New York and title thereto is claimed by the appellant. The appellant contends that the bill should not be dismissed as against the appellees, E. H. Rollins & Sons. He alleges that these appellees have $4,840.28, the property of the incompetent, Philip A. Meyer, against which sum claim is made by the estate of Hugo R. Meyer, and that these appellees have declined to comply with either of the demands and hold this sum of money within the Southern District of New York. Appellees E. H. Rollins & Sons have filed an answer, admitting possession of the money and asserting that the plaintiff and defend-

ant both claim it. The decree entered dismisses the bill, for the reason the appellee Beard is a necessary and indispensable party defendant, and was not and is not an inhabitant residing in the district, and did not consent to be sued. It was error to dismiss the bill as against E. H. Rollins & Sons. If the property held is that of Philip A. Meyer, relief may be had by appellant against it. We will reverse the decree as to E. H. Rollins & Sons, and remand the suit to the District Court, to determine what relief should be granted in equity after a trial. It may become necessary to transfer the cause to the law side of the court. The decree, so far as it dismisses the bill against the appellee Beard, is affirmed.

Decree modified."

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